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No.....

Supreme Court, U.S.
FILED
JUN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CITY OF LONG BEACH, LONG BEACH CITY COUNCIL, EVAN BRAUDE, WALLACE EDGERTON, JAN HALL, THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI, ED TUTTLE, AND WARREN HARWOOD,

Petitioners,

VS.

AIRCAL INC., AMERICA WEST AIRLINES, WESTERN AIRLINES, TRANSWORLD AIRLINES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Ninth Circuit, Nos. 86-6661 and 86-6662 (C.D. Cal. No. CV 83-4065 LEW)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court has discretion to determine the minimum number of jet flights to be permitted at a municipal airport neither owned nor operated by the federal government?

PARTIES BELOW

The parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit from which review is sought are Petitioners the CITY OF LONG BEACH, the LONG BEACH CITY COUNCIL, EVAN BRAUDE, WALLACE EDGERTON, JAN HALL, THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI, ED TUTTLE, and WARREN HARWOOD,* and Respondents AIRCAL INC., AMERICA WEST AIRLINES, WESTERN AIRLINES, and TRANSWORLD AIRLINES, INC.

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*Petitioners state that they have no parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 28.1.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of Long Beach, the Long Beach City Council, and its individual members (collectively the "City"), pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review that Court's decision affirming an unprecedented mandatory injunction of the Federal District Court for the Central District of California which, *inter alia*, compels the proprietor of the Long Beach Municipal Airport

(the "Airport") to allow a 44 percent increase in the number of air carrier jet takeoffs and landings.[1]

The injunction trammels legitimate local environmental goals by compelling increases in flights by the most environmentally disruptive class of aircraft when community noise from airport operations already exceeds criteria for maximum exposure which none of the respondents challenge.[2] Although premised on the federal interest in a "vibrant national transportation system" (Appendix B, p. B-2), the Order makes no finding, express or implied, that Congress has preempted the power of airport proprietors to limit community noise from aircraft operations or that the burden on commerce imposed by the City's environmental regulation "is clearly excessive in relation to the putative local benefits" of the ordinance. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Nor is there any finding of discrimination against interstate commerce.

Review by this Court is appropriate because this case implicates the problems of airport capacity which have been the subject of ongoing Congressional scrutiny, FAA notices of proposed rulemaking, industry attention, and public concern[3] and the injunction in issue posits a solu-

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[1]The injunction also results in an 80 percent increase in the number of air carriers using the Airport and a 40 percent increase in the number of passengers; all notwithstanding evidence that the passenger terminal and related facilities are already overtaxed during peak periods.

[2]Noise from existing aircraft operations has already precipitated in excess of 1,280 nuisance and inverse condemnation suits against the City — suits which the respondents and the United States assert are the sole responsibility of the City.

[3]Since January 1, 1986, more than 200 articles have treated the problem of noise and capacity at airports around the nation. A January 31, 1986 article in The Washington Post discusses a recent

tion to this national problem which flatly contradicts the principles of federalism enunciated by this Court in its dormant Commerce Clause cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. It is set forth in Appendix A at page A-1. The District Court's Order compelling new flights is also unreported. It is set forth in Appendix B at page B-1.

In relevant part, the District Court concluded "that the record raises serious questions as to the reasonableness and fairness of the City's program to limit growth at Long Beach Airport." (Appendix B, p. B-3.) The Court thus ordered the City to increase the permissible number of air carrier flights notwithstanding undisputed evidence that noise from present operations already exceeds the City's unchallenged noise goal. The Ninth Circuit presumed that the District Court had discretion to dictate "the appropriate minimum number of flights to be permitted" at the Airport and refused to find a clear abuse of such discretion. (Appendix A, p. A-3.)

JURISDICTION

The District Court's jurisdiction was invoked on the basis of 28 U.S.C. Section 1331 (federal question jurisdiction). The Ninth Circuit's jurisdiction over the appeal of

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proposed policy statement from the FAA on the subject. A New York Times story, on November 16, 1986, discussed the issues of federalism which are implicated. In the month of April, 1987 alone, at least 8 articles have appeared which discuss the problem of airport capacity: New York Times, April 12, 19, 26; Aviation Week and Space Technology, April 20; Congressional Quarterly, April 18; Washington Post, April 5; Los Angeles Times, April 2; Bureau of National Affairs, Daily Report for Executives, April 24, 1987.

the District Court's Order was premised upon 28 U.S.C. Section 1292(a) (appeal of an order granting and refusing to vacate a preliminary injunction). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Review by certiorari is sought on the grounds that the Ninth Circuit has decided a substantial question arising under the United States Constitution and federal statutes involving aviation contrary to the decisions of this Court upholding the power of local municipalities to adopt environmental and land use regulations which do not impose burdens on interstate commerce which are clearly excessive when considered in view of the local benefits.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States Article I, Section 8, Clause 3:

> "The Congress shall have the power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

In 1981, in an effort to deal with the problems of noise associated with increasing numbers of operations at the Airport by air carrier jets, the City Council adopted an

ordinance which established, *inter alia*, a limit of 15 air carrier jet flights per day and gave a priority to less noisy planes. (E.R. 1152-63.)[4] In 1983, the Airport was being served by three air carriers. (E.R. 121, Paragraph 6; 1155.) When the City received requests to operate more than 15 flights, the City, pursuant to the 1981 ordinance, allocated the 15 allowable flights among five carriers. Two of the incumbent carriers were informed that they would have to reduce their operations.

On June 23, 1983, Alaska Airlines ("Alaska"), one of the airlines which was to lose a flight, brought suit to enjoin the City from reducing its utilization of the Airport. Alaska claimed that the 1981 ordinance violated the Commerce, Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution, and was in conflict with agreements between the City and the Federal Aviation Administration ("FAA"). (E.R. 1143.) Since Alaska filed its original complaint, numerous other commercial air carriers have joined the suit as plaintiffs-in-intervention, making substantially similar claims for relief. Some of the carriers have added causes of action for violations of the Federal Aviation and Civil Rights Acts. The plaintiffs seek declaratory and injunctive relief, as well as attorneys' fees and monetary damages.

In December 1983, after new flights had been awarded by the City to the carriers which had qualified under the City's then-operative ordinance, District Judge Laughlin Waters enjoined the City from reducing any of the flights previously allocated (or expected to be allocated) to the carriers already using the Airport. This resulted in a minimum of 18 daily flights (each flight being one takeoff

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[4]References are to the Excerpts of Record filed by the Petitioners in the Ninth Circuit.

and one landing) at a time when the City was seeking to reduce the impacts of aircraft noise. (E.R. 12.) Following entry of that order, the litigation was held in abeyance while the City conducted an extensive study under Part 150 of the Federal Aviation Regulations, 14 CFR Section 150 *et seq.* A City-appointed task force (the "Task Force"), composed of representatives of all groups interested in the Airport (including the airlines), was charged with gathering information and submitting recommendations to the City Council on methods to achieve compatibility between the Airport and its surrounding community. (E.R. 516; 970.)[5]

On July 22, 1986, following receipt of a host of recommendations from the Part 150 Task Force concerning methods to reduce the impacts of aircraft noise while permitting additional service by air carriers, the City Council adopted a comprehensive Noise Compatibility Program and an ordinance to implement it. (E.R. 281-303; 305 *et seq.*) The central elements of the ordinance are the determinations (1) that no homes, schools, or hospitals should be exposed to annual noise greater than 65 decibels on the Community Noise Equivalent Level

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[5]In May of 1986, the City began to receive formal claims from residents of the community surrounding the Airport that noise and other pollution from aircraft operations constituted a taking of their property without just compensation. Damages under California's novel "continuing nuisance" law were also sought. See *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 872, 218 Cal.Rptr. 293, 705 P.2d 866 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986) and *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86, 97, 160 Cal.Rptr. 733, 603 P.2d 1329 (1970), *cert. denied*, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980). Damages in excess of $300 million have now been demanded on behalf of more than 1,280 local residents. (E.R. 144.)

("CNEL") scale[6] and (2) that the parts of the community which have so far avoided the adverse impacts of jet noise should be protected from increases in the noise they presently receive (primarily from the considerable number of general aviation flights). (E.R. 286; 273, Paragraph 3; 277-8, Paragraphs 9-10.)[7]

In order to achieve the goal of having no incompatible property exposed to more than 65 CNEL, cumulative noise in the residential areas to the northwest and southeast of the Airport must be reduced (homes in these areas presently receive noise above 65 CNEL). (E.R. 274, Paragraph 4.) To reach the established noise limitation without necessarily reducing aviation activity at the Airport, the ordinance, *inter alia*, established maximum "Single Event Noise Exposure Levels" ("SENEL's") (limitations on the amount of noise that can be made by aircraft during each takeoff and landing) and a collection of restrictions on general aviation, charter, and industrial

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[6]CNEL is a weighted average of noise occurring during a 24-hour day. The methodology takes into consideration the peak noise levels produced by individual aircraft, the number of flights, the amount of time during which aircraft noise is intrusive, and the time of day or night during which the intrusions occur. The State of California and other regulatory agencies (including the federal government) have established 65 decibels of noise on the CNEL scale as the maximum level of cumulative noise generally regarded as reasonable in the residential community around an airport. (E.R. 330, Paragraph 7.)

[7]In adopting the ordinance, the City Council chose not to adopt one possible methodology which would have allowed more air carrier flights — the shifting of business jet operations to an alternate runway so that they would fly over a part of the community which is not presently exposed to jet noise. The reductions in noise in the part of the community which had received business jet noise could then have been the predicate for an increase in air carrier flights over that area without an overall increase in the level of cumulative noise received by that segment of the City.

operations.[8] Contrary to the desire of the air carriers, the ordinance required that cumulative noise be reduced to the 65 CNEL goal before new air carrier flights would be permitted.

Following adoption of its new program, several air carriers moved to modify the 1983 injunction to require the City to permit an immediate increase in flights. (E.R. 82, 89, 96, 103, 110.) On September 8, 1986, the District Court heard arguments on the motions. On October 17, 1986, the Court ordered the City to permit an increase in air carrier flights to 26 daily departures and 26 daily arrivals. (Appendix B.) On November 7, 1986, the City timely filed a Notice of Appeal (E.R. 1) and a motion for a stay of the preliminary injunction (E.R. 1199-1206). On December 1, 1986, the District Court denied the City's motion to stay, after which a motion was made to the Circuit Court for a stay pending appeal. (E.R. 1193-94.) On January 14, 1987, the Circuit granted a stay of the District Court's Order pending appeal.

On April 14, 1987, the Circuit filed its Memorandum affirming the District Court. (Appendix A.) It also entered an Order dissolving the stay pending appeal. On April 27, 1987, the Court denied the City's motion for a further stay pending review by certiorari. On April 29, 1987, the petitioners sought a stay of the District Court injunction pending the timely filing and action on a petition for certiorari. Justice O'Connor denied that Motion on May 4, 1987.

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[8]The studies conducted by the Task Force (summarized at E.R. 332-37) demonstrated that if the SENEL limits and other noise mitigation measures were implemented, cumulative noise levels would be sufficiently reduced so that air carrier flights could be increased without resulting in community noise exceeding the 65 CNEL limit. (E.R. 275, Paragraph 6.)

REASONS FOR GRANTING THE WRIT

At issue here is the tension between the federal interest in interstate commerce and the local interest in maintaining a chosen level of environmental quality. The last time such an issue was presented in the aviation area was in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). There, the Supreme Court decided, by a five to four decision authored by Justice Douglas, that a city which did not own an airport within its jurisdiction was preempted from regulating noise from aircraft using it. The Court acknowledged that the power of municipal proprietors to adopt aircraft noise regulations was not preempted, but left for another day the issue of the scope of that power. Justice Rehnquist wrote for a four-Justice minority which accepted the position of the United States and found no basis for concluding that Congress intended to oust any municipality (proprietor or not) within which an airport was located from exercising its traditional powers to preserve environmental quality. 411 U.S. at 640-54.

In the years which have followed the *Burbank* decision, the Circuit Courts have occasionally addressed the question of the scope of proprietor power and the standards under which the federal courts will review its exercise. In no case has there been a determination that the federal courts may affirmatively compel a municipal proprietor to raise a reasonably established ceiling on maximum permissible noise in order to accommodate the interests of interstate commerce.

While the Circuits have grappled with the extent of proprietor power in light of the federal preemption of airspace management, the Supreme Court has recently tightened the burden of demonstrating that a local regulation in an area Congress has refused to preempt entirely is invalid under the Supremacy or Commerce Clause. The

tenor of the current decisions of the Court reflect a renewed sensitivity to the propriety of locally elected officials taking steps to protect local environmental concerns notwithstanding the fact that federal interests may be affected. As recently as March 24, 1987, the Supreme Court upheld the power of the California Coastal Commission to regulate mining in a national forest despite a claim that several federal acts regarding the use of federal land preempted the state's power. *California Coastal Commission v. Granite Rock Company*, ___ U.S. ___, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987). *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 105, 78 L.Ed. 443 (1984); *CTS Corp. v. Dynamics Corporation of America*, ___ U.S. ___, 107 S.Ct. 1637 (1987); *Wardair Canada, Inc. v. Florida Department of Revenue*, ___ U.S. ___, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986).

Notwithstanding the narrowness of the grounds on which an order such as that in issue might properly be based, the District Court's conclusion to increase the environmental burdens of the Airport is supported only by a vague conclusion that additional flights are "justified". (Appendix B, p. B-3.) Whatever may be the underlying rationale, however, the Order, and the Circuit's affirmance, necessarily runs counter to deeply ingrained principles of federalism. First, the order is manifestly inconsistent, as a matter of law, with decisions of the Circuits and of this Court regarding matters of local concern into which Congress has refused to intervene.[9]

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[9]In the words of the Federal Aviation Administration (the "FAA"), the City retains the power to limit the environmental impacts of aircraft operations "in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce". (34 Fed.Reg. 18355 November 18, 1969.) The conclusion that there is no preemption of proprietor power to adopt nondiscriminatory noise regulations has been confirmed by the Second Circuit (*see British Airways Board v. Port Authority of New York*, 558

Second, even if it is assumed that the District Court did not adopt the wrong legal principles, it at least erred in applying them to the virtually undisputed facts: There simply was no evidence upon which it might have been concluded that the City's refusal to permit increases in the number of jet operations until its unchallenged noise goals have been achieved *unduly* burdened interstate commerce. Under the teachings of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) and *Brotherhood of Locomotive Firemen and Engineermen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968)), the District Court was obliged to find that the burdens of the ordinance on interstate commerce were "clearly excessive" in light of the local benefits. It did not, as it could not.

Finally, even assuming that the District Court could have ordered new entry into the Airport because of some compulsion of federal law, the Court at least erred in failing to draw an injunction which would accomplish this objective without compromising the legitimate environmental concerns of the City. Rather than compelling increases in flights, with the environmental burdens which attend them, the Court should have ordered the City to develop a mechanism to permit entry without increasing flights (for example, by re-allocating the existing flight capacity of the Airport).

This approach would have served the federal interest: (1) without depriving the City, its residents, and their elected officials of their constitutional right to be free

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F.2d 75, 84-85 (2d Cir. 1977)), by the Ninth Circuit (*see Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927 (C.D.Cal. 1979), *aff'd* 659 F.2d 100, 104-05 (9th Cir. 1981)), and by this Court (*see City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 635, n. 14, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973)).

from unnecessary federal interference in matters of peculiar and wholly legitimate local concern; (2) without subjecting thousands of residents of the City to increases in cumulative noise and the number of intrusions by the sorts of aircraft which are most disruptive to home and school activity; and (3) without exposing the City — which has already been named as a defendant in more than 1,280 inverse condemnation suits as a result of present noise levels — to new vistas of financial exposure.

In sum, the City's petition for certiorari is amply supported by the trend away from federal intrusions into matters of appropriate local cognizance; by the broad significance of the issues of airport noise, access, and capacity which this case raises; by the departure from the teachings of this Court which the decisions below represent; and by the impact that comparable decisions could have on the legitimate rights of municipalities to act for themselves in unpreempted areas of environmental quality.

THE NINTH CIRCUIT'S ASSUMPTION THAT THE DISTRICT COURT HAD DISCRETION TO DETERMINE THE MINIMUM NUMBER OF FLIGHTS AT A MUNICIPAL AIRPORT IS UNPRECEDENTED AND UNSUPPORTABLE

A. The City Has Clear Authority to Enact Noise Ordinances, and Such Ordinances Are Entitled to Substantial Deference.

Proprietor power over noise has been explicitly recognized by Congress, by the Department of Transportation, and by the FAA. In 1968, in connection with the amendments to the Federal Aviation Act giving the FAA authority to promulgate source noise limits, the Senate Commerce Committee stated that it did not intend "to effect any change in the existing apportionment of powers

between the Federal and State and local governments." Sen.Rep.No. 1353, 90th Cong. 2d Sess. (1968) (reprinted in (1968) *U.S. Code Cong. & Ad. News* 2963). The Committee then quoted with approval a June 22, 1968 letter, prepared by the Secretary of Transportation, which confirmed that the federal government did not intend to establish a federal system which would require airports to accept additional noise burdens and, for that purpose, to purchase additional noise easements. *Id.; see Burbank,* 411 U.S. at 635 n. 14.

Pursuant to the authority given it in 1968, the FAA adopted Part 36 of the Federal Aviation Regulations. 14 CFR Part 36, 34 Fed.Reg. 18355 *et seq.* (November 18, 1969). Part 36 established standards for the design and manufacture of aircraft and aircraft engines. In the Preamble to Part 36, the FAA clearly stated that federal regulation of engine noise did not undercut the role and responsibility of airport proprietors in the process of controlling the noise received by local residents. 34 Fed. Reg. 18355.

The federal courts have consistently confirmed the right of airport proprietors to regulate noise. "[I]f any coherent Federal policy can be discerned, it is that aircraft noise abatement with respect to particular airports is primarily up to the local proprietor, not the FAA." *DiPerri v. Federal Aviation Administration*, 671 F.2d 54, 57 (1st Cir. 1982). An apt summary of the law is contained in *Santa Monica Airport Ass'n*, 659 F.2d at 104-05:

> "The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs. *See, e.g., British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84-85 (2d Cir. 1977) (and authorities cited therein) .... Congress intended to allow a municipality flexibility

in fashioning its noise regulations. *See Hayward, supra,* 418 F.Supp. at 425, n.13."

See also Global International Airways Corp. v. Port Authority of New York and New Jersey, 727 F.2d 246, 251-52 (2d Cir. 1984), and *Air Transport Association v. Crotti,* 389 F.Supp. 58 (N.D.Cal. 1975).

The courts have also confirmed the inappropriateness of federal intervention in the discretionary decisions made by a municipal proprietor, noting that the principles of comity and federalism "militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted." *Santa Monica Airport Ass'n,* 659 F.2d at 104-05.[10] *Accord: Western International Hotels v. Tahoe Regional Planning Agency,* 387 F.Supp. 429, 437-38 (D.Nev. 1975), *aff'd in part, rev'd in part, and vacated in part,* 566 F.2d 1353 (9th Cir. 1977) *aff'd in part, rev'd in part, and vacated in part,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (proposition cited not affected); *Aircraft Owners and Pilots' Ass'n v. Port Authority of New York,* 305 F.Supp. 93, 103 (E.D.N.Y. 1969).

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[10]See *British Airways Board v. Port Authority of New York and New Jersey,* 558 F.2d 75, 83 (2d Cir. 1977); *Brotherhood of Locomotive Firemen & Engineermen v. Chicago, Rock Island & Pacific Railroad Co.,* 393 U.S. 129, 138-39, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968). It has also been said that a party challenging the constitutionality of a local ordinance "must negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 365, 93 S.Ct. 1001, 35 L.Ed. 200 (1973), citing *Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940). *See also Flemming v. Nestor,* 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Goldblatt v. Hempstead,* 369 U.S. 590, 596, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 469, 101 S.Ct. 715, 726, 66 L.Ed.2d 659 (1981); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 680-81, 101 S.Ct. 1309, 1321, 67 L.Ed.2d 580 (1981) (Brennan, J., concurring).

B. The Federal Interest In Interstate Commerce Does Not Compel Airports or Their Neighbors to Accept Environmental Burdens Fairly Determined To Be Excessive.

The carriers also argued in the District Court that the general federal interest in aviation competition may compel the City to accept increases in flights. They relied on a collection of cases (discussed immediately below) concerned only with discrimination in the allocation of existing capacity or with attacks on patently irrational restrictions. The expansion of these cases into the unprecedented mandatory injunction in issue was the District Court's most manifest error.

In the first instance, the cases relied upon by the carriers pertain solely to restrictions that have been shown either to have no rational basis or to have an impermissible discriminatory effect. In the *Concorde* cases,[11] the courts concluded that while New York could set a limit on the maximum noise levels of individual flights, it could not exclude the supersonic transport without evidence that the plane could not meet the limits. The courts in the *Santa Monica* cases,[12] which upheld a collection of proprietor regulations, struck down a blanket exclusion of jets only after the plaintiffs presented substantial evidence that some of the excluded jets were quieter than some of the piston planes which were permitted to operate at the airport.

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[11] *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977); *British Airways Board v. Port Authority of New York and New Jersey*, 437 F.Supp. 804 (S.D.N.Y. 1977); *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002 (2d Cir. 1977).

[12] *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927 (C.D.Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981).

The curfew cases relied upon by the air carriers[13] are no more apposite. These cases uphold curfews where they are shown to have a rational basis and strike them down where they do not. *United States v. County of Westchester,* 571 F.Supp. 786 (S.D.N.Y. 1983), is illustrative. In *Westchester,* the County decided, without any evidence that the few existing night flights constituted a noise problem, to close the airport at night. The ordinance was, of course, overturned.

Here, the City has not decided to eliminate any flights, let alone decided to close the Airport (at night or otherwise). It has decided to allow more flights (which will bring increases in the number and duration of intrusive noise events), but not until its cumulative noise goal has been achieved.[14] Accordingly, the City Council's decision as to the acceptable level of noise in the community was within its discretion. *See also City of San Antonio v. CAB,* 374 F.2d 326, 329 (D.C. Cir. 1967); *City of Houston v. FAA,* 679 F.2d 1184, 1193 (5th Cir. 1982); *Village of Belle*

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[13]*National Aviation v. City of Hayward,* 418 F.Supp. 417 (N.D.Cal. 1976); *United States v. County of Westchester,* 571 F.Supp. 786 (S.D.N.Y. 1983); *United States v. The State of New York,* 552 F.Supp. 255 (N.D.N.Y. 1982), 708 F.2d 92 (2d Cir. 1983), *cert. denied,* 466 U.S. 936, 104 S.Ct. 1907, 80 L.Ed.2d 456 (1984).

[14]Not only have the carriers failed to point out a single case which supports their claim that federal law can compel an *increase* in noise, they have ignored the admissions of the FAA that no such authority exists. The FAA has recently published for consideration by the aviation community a proposed policy which would give the FAA discretion to include, as an additional condition in grant agreements with airports, an undertaking by the airport to construct such facilities as are necessary to allow the runways to be used to their maximum capacity. Surely if the FAA or the courts had the power to accomplish this under existing law, the FAA would need no change of policy in order to justify obtaining such undertakings by contract. (E.R. 144.)

Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct 1536, 39 L.Ed.2d 797 (1974); *Brown v. ITT Rayonier Inc.,* 497 F.2d 234, 236 (5th Cir. 1974). The District Court's apparent conclusion that the national interest outweighed the legitimate environmental concerns of the City was an unprecedented effort to alter the balance of liability created by this Court in *Griggs v. Allegheny County,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 585 (1982) and its progeny. It was manifestly erroneous.

C. The City's Refusal To Permit Additional Flights Until Cumulative Noise Has Been Reduced To Acceptable Levels Was Supported by Substantial Evidence.

Since the power of the City to enact regulations "to establish acceptable noise levels for airfields and their environs" is clear (*Santa Monica Airport Ass'n.,* 659 F.2d at 104), the carriers could properly obtain an injunction overriding such regulations only upon clear proof that the City's determination to achieve its noise reduction goal *before* allowing increases in flights was irrational, unduly discriminatory, or contrary to some specific federal statute. *Id.* The airlines failed to make such a showing.

Preliminarily, they made no effort to show that the City's adoption of 65 CNEL as the reasonable noise reduction goal was irrational. For good reason — both the State of California and the federal government have recognized that this is a reasonable standard. (E.R. 330, Paragraph 7.) Nor did the carriers dispute the testimony that noise in residential communities surrounding the Airport *presently* exceeds 65 dB on the Community Noise Equivalent Level Scale. (E.R. 368, Paragraph 11.)

Given their inability to challenge either the reasonableness of the City's noise reduction goal or the fact that the goal is presently being exceeded, the carriers argued

(1) that the City unreasonably refused to permit flight increases *before* achievement of the City's noise goal, (2) that the City's noise goal *can*, notwithstanding eight more takeoffs and eight more landings, be achieved if the City will only take action purportedly within its power to shift business jet flights from one runway to another, (3) that the City is obliged to allocate more of the Airport's noise capacity to the air carriers, or (4) that the new flights would pose such a minimal increase in the burdens of jet noise as to be justified in light of the federal interest in interstate commerce.[15] None of these professed bases for compelling an increase in flights withstands scrutiny.

1. It Was Clearly Reasonable To Delay Flight Increases Until Achievement Of The City's Noise Goals.

The only basis upon which the air carriers challenge the City's patently logical decision to achieve its noise reduction goal before allowing increases in flights was the inaccurate (and, in any event, irrelevant) contention that the City's Part 150 Task Force reached a different conclusion. The Task Force proposal for increases in air carrier flights was premised upon accomplishment of the overriding objective of complying with the 65 CNEL limitation. (E.R. 305, 306).

But even if the Task Force had concluded that immediate increases in flights would produce acceptable in-

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[15]The carriers also sought to convince the District Court that the City's motivations were illegitimate. The City's motivations, however, are irrelevant. *California v. LaRue*, 409 U.S. 109, 126 n.3, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (Marshall, J. dissenting); *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

creases in noise levels, that would not render the City Council's determination irrational. The City's power extends beyond merely avoiding the intolerable. It may also avoid the merely burdensome. While it is obviously empowered to assure that neighborhoods are merely livable, its discretion is also broad enough "to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. at 1, 9. *Accord, Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) ("The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary").

Congress has expressly refused to preempt these traditional powers of municipal proprietors. Sen.Rep.No. 1353, 90th Cong. 2d Sess. (1968) (reprinted in (1968) *U.S. Code Cong. & Ad. News* 2963); *Santa Monica Airport Ass'n*, 659 F.2d at 103 fn. 5, 104-05, *National Aviation v. City of Hayward*, 418 F.Supp. 417, 424-25 (N.D. Cal. 1976); *Aircraft Owners and Pilots' Ass'n v. Port Authority of New York*, 305 F.Supp. at 106. It follows that the District Court could not appropriately substitute its judgment as to the public good for that of the elected City Council. *See also Meachum v. Fano*, 427 U.S. 215, 229, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (district courts are not empowered to "sit to supervise" important state institutions); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (the court is not given the "general assignment to go about doing good.").

2. The City's Refusal To Shift Noise From One Part Of The Community To Another In Order To Achieve One Noise Goal At The Expense Of Another Was Clearly Sensible.

The carriers also claimed in the lower court that the City *could*, consistent with its noise goals, permit increases in air carrier flights merely by calling for a shift in business jet flights from the runway used by the air carriers to a runway now used almost exclusively by general aviation propeller aircraft. Their effort to challenge what is a patently reasonable decision to avoid jet flights over a portion of the community which has thus far escaped that burden relies almost exclusively upon the fact that the Task Force recommended the idea. Evidence that an appointed study group supported this proposal, however, does not support the claim that the City was irrational in rejecting it on environmental and liability grounds.

The part of the Long Beach community located under flights taking off from Runway 30 (the runway now used by both air carrier and business jets) is the most adversely impacted part of the City.[16] (E.R. 340-42, Paragraphs 23-25; 277, Paragraph 9.) The part of the community located under the takeoff path of flights from Runway 25L is not presently affected by significant noise from jet flights, although it receives abundant noise from piston aircraft. Indeed, Runway 25L is the most utilized runway at the Airport, receiving about 41 percent of the 400,000 annual takeoffs and landings. (E.R. 93.) Unlike the area to the north-west of the Airport (under the flight path of Runway 30), the community located adjacent to

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[16]Runway 30 is the runway with a compass heading of approximately 300 degrees (south-east to north-west). Runway 25L is one of two runways with a compass heading of approximately 250 degrees (east to west).

Runway 25L is not subject to cumulative noise in excess of 65 CNEL. (E.R. 277, Paragraph 9; 556.)

Thus, if business jets were diverted to Runway 25L, the number of air carrier flights on Runway 30 could be increased without an increase in cumulative noise to the north-west. (E.R. 340-42, Paragraphs 23-25.) Further, while the shifting of business jets to Runway 25L would increase the number of noise intrusions and the amount of time during which noise interferes with community activity to the west of the Airport, cumulative noise would not reach 65 CNEL. (*Id.*)

Possessed of this information, the Task Force and the City Council came to different conclusions on whether to degrade the quality of the environment to the west of the Airport in order to permit an increase in air carrier flights over the community to the north-west. In the District Court, the carriers claimed that the City simply "ignored" the Task Force proposal. To the contrary, the City considered the alternatives, both of which are reasonable, and decided to maintain the quality of the environment to the west and, at the same time, avoid increasing the City's exposure to inverse condemnation and nuisance suits from residents affected by takeoffs on Runway 25L. (E.R. 286; 273.)

The evidence in the record is more than adequate to support the City's decision. Initially, an examination of the pattern and location of noise damage suits (E.R. 391) leads to several pertinent conclusions:

First, noise suits are filed, almost exclusively, by the residents who are exposed to the noise of jets taking off and landing. Second, these residents are sufficiently disturbed by the noise that they have initiated suit even though they are subjected to a comparatively small per-

centage of the total operations at the Airport. Third, the majority of the suits (whether precipitated by takeoff or landing noise) are filed by people who receive *less* — in a great many cases, significantly less — than 65 dB CNEL. Fourth, in areas of the community exposed to many times the number of flights — but flights by propeller aircraft used by general aviation — there are very few suits. (*Id.*)

In addition to the conclusions drawn from a general examination of the pattern of noise suits, acoustic analysis showed that the proposal to shift business jets to Runway 25L would have increased cumulative noise significantly in residential areas located to the west of the Airport: CNEL values in that community would have been increased by 2 to 3 dB (*a three decibel increase representing a 100 percent increase in noise*). (E.R. 340-42, Paragraphs 23-25.) At the school nearest the west end of Runway 25L, there would have been a significant increase in the time during which aircraft noise interferes with teaching. (E.R. 367-68, Paragraph 10.) For the rest of the community, noise from aircraft operations would have intruded above ambient levels on a more substantial basis and for longer periods of time. (E.R. 848-49.)[17]

Notwithstanding the foregoing, the carriers protested to Judge Waters that the shift of business jets *must* be undertaken because no new area would be subject to noise above the 65 CNEL cumulative noise goal. In taking this position, the carriers ignored the fact that 65 CNEL is not a *minimum* which should be attained in all areas, but

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[17]The fact that cumulative noise would not exceed 65 CNEL is a false issue. At that level, there remains a significant percentage of the community which is highly annoyed by noise. The California Noise Standards thus explicitly recognize that airports may properly regulate noise below 65 CNEL. 21 *Cal. Admin. Code* Section 5003.

a *maximum* to which excessive noise must be reduced. (E.R. 329-30, Paragraph 6.)[18]

In light of these considerations, the City decided not to compromise its noise goals and open itself to new vistas of potential liability by exposing a portion of the community which has not previously been burdened by jet flights to the equivalent of about half the current air carrier jet departures. It also properly elected to preserve the quality of life in those communities.

3. The City's Refusal to Discriminate Against Other Users of the Airport In Order to Allocate Additional Flights To the Air Carriers Had Substantial Justification.

The carriers contended below that the City could have achieved its noise goals without denying new air carrier flights by imposing greater restrictions on users of the Airport other than air carriers. They claimed that the City's refusal to do so was irrational, arbitrary, or invidiously discriminatory. This contention reflects a fundamental misconception of the impacts of air carrier jet flights on noise levels and noise suits and ignores the fact that the majority of the noise capacity of the airport has already been allocated to the air carriers. The following points merit special note:

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[18]The contention that new air carrier flights can be allowed because the City can dictate which runway the business jets shall use is also based upon a false assumption that the City has control of runway utilization. To the contrary, "preferential runway use programs" are subject to the FAA's responsibility for safety. They cannot be implemented unilaterally. (E.R. 844.) Operating procedures are also subject to rigorous FAA review. 49 U.S.C. Section 1348(c); FAA Advisory Circular 91-53 (E.R. 628-34); 14 C.F.R. Parts 91.3(a), 91.87(f)(1), 91.89(h).

a. Per occurrence, the air carriers' flights are the noisiest operations. Their three percent of total operations cause 60 percent of cumulative noise in the part of the community most exposed. (E.R. 335, Paragraph 13.)

b. The lawsuits filed against the Airport are almost exclusively the result of jet noise. (E.R. 193; 387-91.)

c. General aviation flights, which have never been a controlling factor in the noise received in the most highly affected areas (E.R. 335, Paragraph 13), have reduced from 633,000 in 1980 to about 400,000 in 1985. (E.R. 513.) Thus, *substantial reductions in* non-*air carrier flights have already been accomplished.* General aviation is also a significant economic contributor to the City.[19]

d. Flights by charter and industrial operators are already minimal: in the first quarter of 1986, for example, there were 5 charter flights in total (.06 per day) and an average of less than 2 industrial flights per day. (E.R. 950-51.) The economic benefits of allowing a continuation of this modest number of flights dwarfs the entire economic impact of all air carrier flights.[20]

In short, the City has not unreasonably restricted air carriers for the benefit of other users — it has signifi-

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[19]General aviation businesses at the Airport have a $63 million impact on the local economy not counting taxes, business purchasing, or indirect employment. (E.R. 124, Paragraph 4.)

[20]The flights are operated by McDonald-Douglas Corporation ("Douglas"), which manufactures aircraft at facilities adjacent to the Airport. Douglas has grown to become the largest employer in the City, providing over 16,800 jobs; it contributes nearly $400 million directly to the Long Beach economy and contributes over $1.8 billion to the regional economy just from its payroll. (E.R. 124-5, Paragraph 15.) During 1985, Douglas had total sales of commercial aircraft from its Long Beach facility of $2.8 billion (it delivered 71 aircraft). (*Id.*)

cantly discriminated in favor of commercial aviation over other aviation interests.[21]

D. Even If Some Relief Were Appropriate, The District Court's Order Was Overbroad.

Under the standards applicable to injunctive relief, the District Court was obliged, even if it properly concluded that some relief was appropriate, to enter the narrowest effective order. *Jett v. Castaneda,* 578 F.2d at 845 (9th Cir. 1978); *Lopez v. Heckler*, 725 F.2d 1489, 1509 (9th Cir. 1984); *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (injunctive relief "must be narrowly tailored . . . and must not intrude unnecessarily on state functions"); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963); *Warner Brothers Pictures v. Gittone*, 110 F.2d 292 (3d Cir. 1940) (where it was concluded that a preliminary injunction which changed the *status quo* should not be granted, *even if irreparable loss would result without the injunction*). *See also Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969) and *Capobianco v. First National Bank of Pelmerton*, 372 F.Supp. 416, 421 (M.D.Pa. 1974).

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[21]The carriers also argued in the District Court that delay in accommodating new entry required the City to permit new flights immediately (irrespective of the noise consequences). Delay alone, however, could not support the Order in issue because the delay in allowing new flights was occasioned by the fact that noise has remained excessive. This case is thus entirely different from *British Airways Board v. Port Authority of New York,* 558 F.2d 75 (2d Cir. 1977), *on remand*, 437 F.Supp. 804, *aff'd as modified*, 564 F.2d 1002 (2d Cir. 1977), in which the District Court expressly found that the Port Authority had "no intention" of adopting a reasonable rule to take the place of a flat exclusion of the Concorde. 437 F.Supp. at 818. Here, the City has already adopted rules to accommodate new entry.

Thus, even if the carriers made a colorable showing in favor of some relief, the District Court was obliged to fashion the narrowest reasonable remedy. If it was the barrier to additional competition among air carriers which Judge Waters found wrongful, the Court could have asked the City to develop a solution or, at most, could have ordered the City to allocate the existing 18 flights among all of the air carriers wishing to serve the Airport. The order increasing flights in the face of presently excessive noise levels went far beyond the reasonable sweep of the court's discretion to fashion an appropriate remedy.

CONCLUSION

For the foregoing reasons the City's Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Ninth Circuit Court of Appeals Below.

United States Court of Appeals for the Ninth Circuit.

Alaska Airlines, Inc., Plaintiff-Appellee v. City of Long Beach, Defendant-Appellant; Long Beach Unified School District, Defendant-Intervenor, v. Pacific Southwest Airlines, Inc., et al., Plaintiff-Intervenor-Appellee; Alaska Airlines, Inc., Plaintiff-Appellee and Pacific Southwest Airlines, et al., Plaintiffs-Intervenors-Appellees v. City of Long Beach, et al., Defendants-Appellants.

Filed: April 14, 1987.

Appeal from: United States District Court, Central District of California, (DC No. CV 83-4065 LEW(Bx)).

MEMORANDUM*

BEFORE: WRIGHT and REINHARDT, Circuit Judges, and MUECKE**, District Judge.

In 1983 the district court issued a preliminary injunction requiring the City of Long Beach, operator of the Long Beach airport, to permit a minimum of eighteen commercial flights per day in and out of the airport. Long Beach appealed from that order. At Long Beach's request, the appeal was recently dismissed, without prejudice, subject to reinstatement by this panel. in 1986, relying on a newly enacted noise abatement ordinance, Long Beach asked the district court to vacate the preliminary injunction. Plaintiffs include both air carriers who

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

have historically used the Long Beach airport and "new entrant" carriers who have sought for some time to use the airport for commercial flights. At the same time the City of Long Beach moved to vacate the 1983 preliminary injunction, the "new entrant" carriers asked the court to amend the injunction by increasing the minimum number of permitted flights. The district court refused Long Beach's request to vacate the preliminary injunction and amended that order by increasing the number of permitted flights from eighteen to twenty-six per day. The additional flights were subsequently awarded to the "new entrant" carriers. Long Beach now appeals the 1986 actions of the district court.

We review the district court's actions under an abuse of discretion standard. *Sports Form Inc. v. United Press International,* 686 F.2d 750, 753 (9th Cir. 1982). *See also Los Angeles Memorial Coliseum Com'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We affirm.

In refusing to vacate the preliminary injunction, the district court concluded that serious questions were raised regarding the legality of the newly enacted noise ordinance which contained a nonseverability clause. The district court also concluded that the City had failed to formulate any plans for improvement of the airport facilities. The district court took careful note of the various interests of all parties involved, including the residents of the City of Long Beach. It also recognized the authority of city airport proprietors "to enact reasonable nonarbitrary and nondiscriminatory airport access ordinances." With respect to the request to increase the minimum number of permitted flights, the district court found that "[a]ny further delay in this matter [would be] unreasonable".

We note, preliminarily, that in issuing the 1983 preliminary injunction the district court did not abuse its discre-

tion and applied the proper legal standards. With respect to its refusal to vacate the 1983 injunction, we conclude that the district court's action was well within its discretion. We cannot say that the district court committed a clear error of judgment nor do we have a firm conviction that a mistake has been committed with respect to any factual matters. A decision as to the validity of the newly enacted noise ordinance must await a trial on the merits. At that time the court can carefully examine the ordinance and its effects, as well as the available alternatives, in light of *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), and *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002 (2d Cir. 1977). Similarly, with respect to increasing the number of permitted flights, we conclude that the district court committed no legal error and acted within its discretion. The appropriate minimum number of flights to be permitted in 1987, as opposed to 1982, is a matter which we would hesitate to substitute our judgment for that of a district court. In reaching this conclusion we read the 1986 order in light of the findings and conclusions issued in support of the 1983 injunction.

There are two additional points we wish to note. First, our decision indicates no view as to the ultimate answer to any questions involved in this case. Our standard of review for preliminary injunctions is different from that applicable to permanent injunctions. Second, the preliminary injunction that was recently amended was issued a number of years ago. The purpose of preliminary injunctions is to ensure that the parties comply with appropriate conditions pending resolution of the case on the merits.

Preliminary injunctions are not intended to be of indefinite duration. Within a reasonable time the parties should bring their dispute to trial on the merits or arrive at an appropriate settlement.

AFFIRMED

APPENDIX B

Order of the United States District Court for the Central District of California.

United States District Court, Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserv, Air California, Western Airlines, America West Airlines, Inc., United Airlines, Inc., American Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Edd Tuttle, and Warren Harwood, Defendants, Long Beach Unified School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: October 17, 1986.

United States District Court, Central District of California, (No. CV 83-4065 LEW (Bx)).

Order Re: City of Long Beach's Motion to Vacate The Preliminary Injunction And The Plaintiff Airlines' Motions to Modify The Preliminary Injunction.

The City of Long Beach's motion to vacate the preliminary injunction of December 9, 1983 and the motions by AirCal, Western, America West, United, Jet America and Alaska to modify that injunction came on for hearing on September 8, 1986. After oral argument, the Court denied the City's motion and took the airlines' motions under submission. The Court has considered all of the papers submitted in connection with this matter and has considered the arguments made by counsel at the hearing. The Court hereby grants the airlines' motions to modify the preliminary injunction and orders an increase of eight (8)

daily flights at Long Beach Airport — from the current total of eighteen (18) daily flights to twenty-six (26) daily flights.

As a preliminary matter, the Court recognizes the diversity of interests involved in this case. The residents of the City of Long Beach seek to minimize the volume and number of noise intrusions by airplanes serving the airport. Those interests clash with the airlines' goal of increasing the number of flights at the airport. To complicate matters, the air carriers themselves differ as to how such additional flights should be allocated. AirCal, Western, America West and Ozark — the "new entrants" — seek to institute service at Long Beach Airport, an opportunity the City has persistently denied them during the course of this litigation. Allocating flights to the new entrants, they point out, furthers the policy stated in the Airline Deregulation Act of 1978, 48 U.S.C. 1302, of increasing competition in the airline industry. The City acknowledges the new entrants' point in the most recent noise compatibility ordinance, which provides for the preferential allocation of new flights to the new entrants.

Conversely, the airlines presently serving Long Beach Airport requests that any additional flights be granted to them. They contend that, like the new entrants, they too have patiently awaited the flight increases. Moreover, they argue that their flight allotment should be increased in return for the business risk they undertook in establishing service at the airport.

The interest of the general public must also be considered. The welfare of the Long Beach residents demands a well-planned growth policy at the airport. Such a growth policy must also account for the public's interest in a vibrant national transportation system — a linchpin of our national system of commerce.

The Long Beach City Council has the formidable job of balancing these diverse interests. As political representatives of the city and proprietors of the airport, they are answerable politically to city residents and responsible legally for lawsuits brought due to excessive noise. In addition, they must attend to the interests of the airlines, the public and the national commercial system. The courts, recognizing these responsibilities, have granted city airport proprietors the power to enact reasonable, non-arbitrary and non-discriminatory airport access ordinances. *Santa Monica Airport Ass'n. v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 647 F. 2d 3 (9th Cir. 1981).

Upon careful consideration, the Court finds that the record raises serious questions as to the reasonableness and fairness of the City's program to limit growth at Long Beach Airport. These questions are amplified by the City's failure to formulate a plan for improvement of airport facilities after almost two years of studying the airport access problem. Thus, the Court denies the City's motion to vacate the injunction and enact its new airport access ordinance.

The Court further orders an increase of eight (8) daily flights at the Long Beach Airport. The record clearly shows that new flight activity at the airport is justified. Even the City concedes in its new ordinance that a total of thirty-two (32) daily flights can be accommodated at the airport. Moreover, the Part 150 study task force — a City-appointed group that extensively studied the issues of noise and access — recommended that a total of forty-one (41) daily flights could be handled. While an FAA review of the task force recommendations would add another objective analysis to the voluminous data, such a study would also add *at least* another six months of delay to this protracted litigation. Any further delay in this

matter is unreasonable, defeats the public interest and contradicts the Congressional policy of a vibrant and competitive airline industry.

The City is invited to submit a proposal as to the method of allocation of these additional eight (8) daily flights. Such a proposal should address the interests aforementioned in this Order and be submitted by November 7, 1986. Upon receipt of the City's recommendations, comments will be solicited from all interested parties.

IT IS SO ORDERED.

LAUGHLIN E. WATERS
Sr. United States District Judge

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 10, 1987, I served the within Petition for Writ of Certiorari in re: "City of Long Beach vs. Aircal Inc., America West Airlines" in the United States Supreme Court, October Term 1986, No. 86-6661 and 86-6662;

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 10, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Subscribed and Sworn to before me this 10 TH day of June, 1987.

My Commission Expires 10/27/90.

June A Mason

Notary Public

OFFICIAL SEAL
JUNE A MASON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1990

No. 86-2002

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL
CLERK

CITY OF LONG BEACH,
LONG BEACH CITY COUNCIL,
EVAN BRAUDE, WALLACE EDGERTON, JAN HALL, THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI, ED TUTTLE, and WARREN HARWOOD,
Petitioners,

VS.

AIRCAL, INC.,
AMERICA WEST AIRLINES, INC.,
DELTA AIR LINES, INC.,
and TRANS WORLD AIRLINES, INC.,
Respondents,

Ninth Circuit
U.S.D.C./C.D. CAL. NO. CV 83-4065 LEW (BX)

JOINT BRIEF OF RESPONDENTS AIRCAL, INC., DELTA AIR LINES, INC., AMERICA WEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC., IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to determine whether the district court abused its discretion in modifying a preliminary injunction based on the evidence that the limits on commercial flights in the City of Long Beach's Ordinance are not reasonable or rationally related to noise concerns at Long Beach Municipal Airport, and that serious questions are raised concerning the lawfulness and constitutionality of the Ordinance?

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No. 86-2002

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CITY OF LONG BEACH,
LONG BEACH CITY COUNCIL,
EVAN BRAUDE, WALLACE EDGERTON, JAN HALL,
THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI,
ED TUTTLE, and WARREN HARWOOD,
Petitioners,

VS.

AIRCAL, INC.,
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DELTA AIR LINES, INC.,
and TRANS WORLD AIRLINES, INC.
Respondents,

Ninth Circuit
U.S.D.C./C.D. CAL. NO. CV 83-4065 LEW (BX)

JOINT BRIEF OF RESPONDENTS AIRCAL, INC., DELTA AIR LINES, INC., AMERICA WEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC., IN RESPONSE TO PETITION FOR CERTIORARI

Plaintiffs in Intervention-Respondents AirCal, Inc., Delta Air Lines, Inc., America West Airlines, Inc., and Trans World Airlines, Inc.[1] ("respondents") respectfully

[1]Pursuant to Supreme Court Rule 28.1, respondents hereby inform this Court that AirCal, Inc., is affiliated with American Airlines, Inc., and that Western Air Lines, Inc. and Delta Air Lines, Inc. are now Delta Air Lines, Inc.

submit the following brief in response to the City of Long Beach's (the "City") Petition for Certiorari (the "Petition"). The City's Petition concerns an October 17, 1986, Order of the district court (the "October 17 Order") (Appendix "E"), in which the district court applied the normal balancing of hardships test involved in the grant of any preliminary relief, and modified its previous preliminary injunction regarding commercial jet departures from Long Beach Municipal Airport (the "Airport"). The October 17 Order was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit on April 14, 1987. (Appendix "B"). On May 4, 1987, Justice O'Connor denied the City's request for a stay of the October 17 Order pending the filing of its Petition (Appendix "A"), and AirCal, America West, and Delta have begun service at the Airport under the district court's order. The City now asks this Court to review the October 17 Order by writ of certiorari when a trial on the merits is scheduled to begin in the district court on November 10, 1987. The preliminary nature of the district court's ruling, the absence of legal issues in the City's Petition worthy of review by this Court, the consistency with which federal courts have struck down airline flight limitations which are not rationally related to noise problems, and the sound exercise of discretion by the district court in granting preliminary relief demonstrate that the City's Petition should be denied.

STATEMENT OF THE CASE

This action for injunctive and declaratory relief against the City was filed by Alaska Airlines, Inc. on June 23, 1983. At that time the City arbitrarily limited commercial jet flights from the Airport to a maximum of 15 departures per day. The air carriers presented evidence that

the 15 flight limit unduly burdened interstate commerce and discriminated against commercial air carriers in favor of general aviation, and the Federal Aviation Administration ("FAA") filed an amicus brief in support of the air carriers' position. On July 28, 1983, the district court struck down the City's limit and granted the air carriers' motions for preliminary injunction. On December 13, 1983, the district court entered its first preliminary injunction prohibiting the City from reducing the number of commercial flights at the Airport below 18 and allocating the minimum 18 flights among commercial carriers. (Appendix "F"). The district court issued extensive findings of fact and conclusions of law in support of its December 13, 1983, order, specifically noting: (1) the irreparable harm to air carriers and the general public caused by the City's flight limit; (2) the air carriers' likelihood of success on the merits based on the evidence that the flight limit impermissibly discriminated against commercial air carriers in favor of general aviation and was not rationally related to noise concerns at the Airport; and (3) the absence of any harm to the City if the injunction were granted. (E.R. 1179-88). Despite the clear wording of the district court's order prohibiting a reduction in flights, the City unilaterally chose to construe the order as prohibiting any increase above 18 commercial jet departures per day. On that basis and on the basis that the noise situation at the Airport was "under study," the City denied any operating rights to respondents during 1983, 1984, 1985, and 1986.

In 1984, facing incontrovertible evidence that its limit on commercial flights was not rationally related to legitimate noise concerns, the City applied for and received a grant from the FAA to conduct a study in accordance with Part 150 of the Federal Aviation Regulations ("Part 150"). 14 C.F.R. §§ 150.1-150.35 (1986). These regulations provide federal assistance to airport proprietors for

the development of airport noise exposure maps and airport noise compatibility programs for submission to the FAA. 14 C.F.R. §§ 150.21, 150.23 (1986). If used properly, the Part 150 process permits airport proprietors maximum input into the regulation of noise at the local level, and gives airport proprietors limited immunity from lawsuits for airport noise if a noise compatibility program is approved, *see* 49 U.S.C. § 2107. But rather than use this process to create rational noise regulations as intended, the City used the Part 150 process to further its own goal of delaying any increase in the number of commercial flights at the Airport. In May, 1984, the City appointed a 21-person Task Force of Airport, air carrier, and community representatives to conduct the Part 150 study. Despite repeated assurances to the district court that the study would be done "shortly," the City failed to complete its portion of the Part 150 project until two years later in June, 1986.

When finally completed in June, 1986, the Task Force's Preliminary Noise Compatibility Program ("PNCP") recommended that: (1) commercial air carrier operations at the Airport be immediately increased from 18 commercial flights to 26 commercial flights per day, with an increase to 33 flights expected to follow in six months; (2) business jet operations and other general aviation flights be shifted from Runway 30 to Runway 25L; and (3) up to 41 commercial flights could be operated from the Airport

without exceeding acceptable noise levels of 65 db CNEL[2] in noise sensitive areas. *See* "PNCP," (E.R. 551-52).[3]

Consistent with the recommendations of the PNCP, an independent study conducted by Kenneth W. Orth, a noise expert for the Boeing Company, found that because of the low takeoff noise characteristics of the Boeing 737-300 aircraft which AirCal, America West, and Delta are using at the Airport, the addition of six to eight commercial flights per day will have a negligible impact on noise levels at the Airport, regardless of whether general aviation flights are shifted to Runway 25L. *See* "Affidavit of Kenneth W. Orth" (E.R. 715-16). The City's own noise expert, Dwight E. Bishop, also made several studies which support the Task Force's conclusions. In one study, Mr. Bishop found that, by simply shifting general aviation and business jet operations to Runway 25L, the City could immediately increase the number of commercial flights by ten per day without increasing current noise levels in noise sensitive areas. *See* "Noise Control Program-Run A" (Appendix "H"). In a second study, Mr. Bishop concluded that preferential use of Runway 25L by business jets and general aviation could help the City accommodate more flights without exceeding the 65 db

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[2]CNEL is the acronym for Community Noise Equivalent Level. CNEL is a noise measure used by the FAA and the State of California to evaluate total airport noise by examining noise volume and the time of day at which noise is generated. For example, noise in evening hours when people are home is given greater weight. The 65 db CNEL limit for noise sensitive areas, those areas with dwellings or other noise sensitive operations such as schools, was chosen by the Task Force because that is the limit currently imposed pursuant to Cal. Pub. Util. Code § 21669.

[3]All references to the Excerpts of Record ("E.R.") or Supplemental Excerpts of Record ("Supp. E.R.") refer to the Excerpts of Record submitted to the United States Court of Appeals for the Ninth Circuit.

CNEL noise limit in any noise sensitive areas. *See* "Initial Look at Noise Impact of Jet Aircraft Takeoffs on Runway 25L" (Appendix "I").

Rather than act on the recommendations of the Task Force and all of the experts who studied the noise question for over two years, the City subjected the PNCP to further "review." One month later, the City rejected the Task Force's recommendations in adopting the noise ordinance at issue herein on July 22, 1986 (the "Ordinance"). The Ordinance differed from the Task Force PNCP in many material respects, including: (1) a maximum of 32 daily commercial flights rather than 41 daily commercial flights recommended by the Task Force; (2) an increase of only two daily commercial flights per calendar quarter based on compliance with 65 db CNEL noise limit, as opposed to the immediate increase of eight flights recommended by the Task Force followed by an anticipated increase to 33 total daily commercial flights over the first six months of operations; and (3) the absence of any provision for shifting general aviation or business jet flights from Runway 30 to Runway 25L. *See* "Ordinance" (E.R. 58-80). The Ordinance also perpetuates the disparate treatment of commercial carriers and general aviation which the district court found objectionable in issuing the December 13, 1983, preliminary injunction, by placing tight constraints on the number of flights and the amount of noise generated by commercial carriers while failing to restrict the number of general aviation flights or the noise generated by general aviation activities. *See* "Ordinance" (E.R. 64-76).

In August, 1986, the City instigated proceedings in the district court to vacate the December 13, 1983, injunction by seeking permission to enforce the Ordinance. Respondents who would still have been denied access to the Airport under the Ordinance after three years of waiting,

contemporaneously filed motions to modify the preliminary injunction and prohibit the City from adopting the unlawful portions of the proposed Ordinance. Respondents submitted evidence to the district court establishing that, by the City's own admission, at least 32 commercial flights per day could be accommodated and that in all likelihood over 40 flights per day could be accommodated without impinging on the City's noise goals. This evidence demonstrated that the City's flight limits contained in the Ordinance were unreasonable, arbitrary, and an undue burden on interstate commerce. Furthermore, after three years of litigation, the City raised the alleged shortage of facilities for the first time in its motion to vacate the December 13, 1983, preliminary injunction. Neither the PNCP or any other study regarding additional flights at the Airport suggested that the Airport's facilities could not accommodate additional flights because of the alleged facilities constraints at the Airport.[4] Respondents submitted evidence demonstrating that the City's facilities argument was without credible factual support. *See* "Supplemental Declaration of Bruce Wetsel in Support of Motion for Preliminary Injunction" (E.R. 456-58). The FAA again filed an amicus brief in support of respondents' position in the district court. (Supp. E.R. 41-61).

After reviewing the extensive briefs and hearing oral argument, the district court enjoined the City from enforcing those portions of the Ordinance which are discriminatory or unduly burdensome on interstate commerce, and modified the 1983 injunction to increase the minimum daily commercial flights at the Airport by eight. (Appendix "E"). In reaching this conclusion, the

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[4]Six of the eight flights allocated under the October 17 Order are now in service with no indication that Airport facilities are adversely affected by the additional service.

district court considered the irreparable harm to respondents and the traveling public resulting from the City's limitation of commercial flights at the Airport and the City's continuing delays in expanding commercial carrier operations. The district court also considered the competing interests of the City and the residents surrounding the Airport in limiting the amount of noise generated at the Airport. After balancing these factors, the district court concluded that the record "clearly shows that new flight activity at the Airport is justified" and that "[a]ny further delay in this matter is unreasonable, defeats the public interest and contradicts the Congressional policy of a vibrant and competitive airline industry." (Appendix "E" at 3).

The October 17 Order invited the City to submit a proposal regarding the allocation of the eight additional flights. (Appendix "E"). On November 7, 1986, the City proposed that the new flights be provided equally to respondents, and on January 15, 1987, the district court adopted the City's proposal and allocated two of the eight additional flights to each of the respondents. (Appendix "D").

In March, 1987, the FAA determined that the noise compatibility program submitted by the City under the Part 150 process was unacceptable.[5] *See* "Record of Approval, Federal Aviation Administration, FAR Part 150 Noise Compatibility Program" (hereinafter "Record of Approval") (Appendix "G"). Specifically, the FAA found that "Long Beach's Part 150 documentation does not substantiate that a maximum number of 32 daily commer-

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[5]This final report of the FAA was submitted to the Ninth Circuit when it was released by the FAA, and is the type of government document which this Court may take judicial notice of under Fed. R. Evid. 201. The City's Petition is notably lacking any reference to this final determination of the FAA under Part 150.

cial flights is reasonably related to achieving its target 65 CNEL criterion," and that "[a] major difficulty in quantifying the impact on commerce of a proposed noise cap at Long Beach is that Long Beach's starting point; i.e., their current situation, is already a restricted air carrier operating environment." ("Record of Approval," Appendix "G" at 4, 8). The FAA also criticized the City for failing to consider less restrictive alternatives, such as eliminating incompatible land uses, before placing a limit on the number of commercial carrier flights at the Airport. ("Record of Approval," Appendix G at 2-3.)

On April 14, 1987, the Ninth Circuit unanimously affirmed the October 17 Order, finding that the district court had applied the appropriate standard in determining respondents' right to preliminary relief, and had not abused its discretion in issuing the October 17 Order modifying its original preliminary injunction. (Appendix "B").

On April 27, 1987, the district court conducted a status conference in this action, setting a trial date for November 10, 1987, a discovery cut-off date of July 31, 1987, and a pretrial conference for September 14, 1987. (Appendix "C"). Document requests and interrogatories have been served, and depositions are currently scheduled for July, 1987.

On April 29, 1987, the City moved this Court for a stay of the October 17 Order pending a ruling on its Petition for Certiorari. Justice O'Connor denied the City's motion for stay on May 4, 1987. (Appendix "A"). AirCal began service at the Airport on May 4, 1987, America West on June 1, 1987, and Delta on July 1, 1987.

SUMMARY OF ARGUMENT

The City's Petition for Certiorari should be denied. The procedural posture of this case and the mundane legal issues presented do not merit review by this Court on petition for certiorari. On October 17, 1986, the district court issued an order modifying a *preliminary* injunction. The order was unanimously affirmed by the Ninth Circuit, and Justice O'Connor denied the City's motion for stay of the district court's order pending resolution of the City's Petition. Trial is now scheduled for November 10, 1987, and discovery is proceeding. As a practical matter, this Court should not use its scarce resources to review a preliminary ruling of such limited duration. Even if certiorari were granted, and respondents strongly suggest that it should not be, the preliminary injunction would have little, if any, effect by the time meaningful review could be conducted by this Court.

As a legal matter, this case simply does not present issues which merit discretionary review by this Court. Petitioners' arguments are based upon a disingenuous view of the factual record presented to the district court, not upon any fundamental constitutional issue. Contrary to petitioners' contentions, the district court has not trampled upon legitimate local environmental concerns in the name of interstate commerce. This is a preliminary injunction case. The district court examined respondents' likelihood of success on the merits, balanced the hardships, and granted a preliminary injunction based on the overwhelming evidence that the City's restrictions on flights are not rationally related to noise considerations. Whether the district court abused its discretion in modifying a preliminary injunction based on this inquiry is not the type of issue which this Court should review by certiorari.

An examination of the merits of the October 17 Order of the district court further confirms that this case is not appropriate for review by writ of certiorari. There is no question that the district court made the appropriate inquiry into respondents' likely success on the merits and the balance of the hardships at issue. The record below demonstrates that: (1) the City's Ordinance is unreasonable, arbitrary, discriminatory, and unduly burdens interstate commerce because the Ordinance is not reasonably related to noise concerns at the Airport; (2) respondents and the traveling public were suffering irreparable injury by reason of the more than three year delay by the City in granting access to the Airport; and (3) the City will suffer no injury by reason of increased flights at the Airport, because the expert evidence and the City's own admissions indisputably establish that such flights can be accommodated without exceeding the City's noise goal of 65 db CNEL at the Airport. This record amply supports the district court's exercise of discretion. For all of the foregoing reasons, the City's Petition should be denied.

THE CITY'S PETITION FOR CERTIORARI SHOULD BE DENIED

A. This Case Is Not Appropriate For Review By Writ Of Certiorari.

Given the preliminary nature of the district court's ruling, the absence of extraordinary legal issues presented by the City's Petition for review of the preliminary injunction, and the consistent line of federal court decisions which have struck down unreasonable and discriminatory limits on commercial air carrier activity, the City's Petition should be denied. *See* Supreme Court Rule 17.

The limited duration of the preliminary relief granted by the district court makes review by certiorari impracti-

cable. The original injunction in this action prohibiting the City from reducing commercial flights at the Airport below 18 per day was issued more than three years ago. The district court modified the preliminary injunction approximately eight months ago, and increased service at the Airport under the October 17 Order began with AirCal's flights on May 4, 1987. The district court took a conservative approach in modifying the preliminary injunction, permitting an additional eight flights per day at the Airport when the evidence and the City's own admissions, *see* Petition at 8, n.8, demonstrate that *at least* 14 additional flights could be accommodated without exceeding the City's noise goals. Trial is scheduled to begin four months from now. This Court's resources should not be allocated to review a preliminary order of such limited scope and duration. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955) (" 'Special and important reasons' [for granting certiorari] imply a reach to a problem beyond the academic or episodic.")

The current state of the record also militates against a grant of certiorari. Although the district court received extensive briefing and affidavits in this matter before issuing its preliminary injunction, no live testimony has yet been given. As this matter proceeds to trial, both sides will undoubtedly augment the record with further expert evidence on the issues of the burden on interstate commerce imposed by the City's flight restrictions, and the impact, if any, on noise at the Airport which will result from additional flights. The City's own failure to develop a satisfactory factual record is evidenced by the FAA's conclusion that the City failed to document the reasons for its decision to limit commercial flights at the Airport. (*See* "Record of Approval," Appendix "G" at 2).

In an attempt to conjure up legal issues which might be worthy of review by certiorari, the City erroneously argues that this case presents the "tension between the federal interest in interstate commerce and the local interest in maintaining a chosen level of environmental quality" which the City argues was addressed by this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973), Petition at 9, and incorrectly relies on police power cases such as *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), to support its claim that it need not permit additional commercial flights or shift business jets to Runway 25L, *see* Petition at 16-17, 19-23.

As discussed below and found by the district court, however, respondents have demonstrated their likely success on the merits under the Commerce Clause by showing that the Ordinance is arbitrary, discriminatory, and unreasonably burdens interstate commerce. *See, e.g., British Airways Board v. Port Authority,* 564 F.2d 1002, 1010-12 (2d Cir. 1977) (*Concorde II*) (discussed below). As proprietor of the Airport the City is not asserting its police powers to regulate noise. Even if the City were asserting its police powers, its regulation of noise at the Airport would still be subject to the Commerce Clause's prohibitions against unreasonable, discriminatory, or unduly burdensome regulation of interstate commerce. *See, e.g., Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 669-70, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981) (striking down truck length limit, which state claimed was related to its police power over safety on state freeways, because limit did not significantly impact safety and unduly burdened commerce by excluding certain trucks from the state). Thus, there are no "novel" constitutional issues as the City suggests in its Petition.

This case presents the simple question of whether or not the district court abused its discretion in evaluating the balance of hardships and respondents' likelihood of success on the merits in granting preliminary relief. The Ninth Circuit panel unanimously concluded that the district court undertook the appropriate inquiry and did not abuse its discretion in issuing the October 17 Order. There is no need for this Court to again review the district court's preliminary determination.

B. The District Court Did Not Abuse Its Discretion In Granting Preliminary Relief.

Even if certiorari were granted, this Court would review the October 17 Order only to determine if the district court applied the proper legal standard, and to determine whether the district court abused its discretion in granting preliminary relief. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); *Brown v. Chote*, 411 U.S. 452, 457, 93 S. Ct. 1732, 36 L. Ed. 2d 420 (1973). The record before this Court overwhelmingly demonstrates that there was no abuse of discretion in the district court's interpretation or application of the preliminary injunction standard.

The district court applied the correct standard in judging respondents' requests for preliminary injunctive relief. On its face, the October 17 Order demonstrates that the district court properly considered the irreparable harm to respondents and the public, the potential for irreparable harm to the City if preliminary relief were granted, the balance of equities, and the likelihood that respondents would succeed on the merits. *See Brown v. Chote*, 411 U.S. at 456.

The record fully supports the district court's decision to grant preliminary relief under this standard. To summarize the pleadings and evidence before the district

court, respondents were suffering irreparable injury by reason of the City's restriction of commercial flights below that necessary to meet reasonable noise standards. This irreparable injury included lost revenue and the loss of the ability to compete with other carriers providing service to the Airport. *See Concorde II,* 564 F.2d at 1011-12 & n.11. The public was suffering irreparable harm from lost travel opportunities and decreased competition among air carriers. This harm to respondents and the public was exacerbated by the City's delay of over three years in addressing the problem. *See id.* at 1011-12. The City will not be irreparably harmed by the grant of preliminary relief because: (1) there will be a negligible, if any, increase in noise at the Airport and therefore no increase in potential liability by the City for noise emissions; and (2) the Airport's facilities can handle the eight additional flights with appropriate planning. These same considerations also demonstrate that the balance of the equities tips strongly in respondents' favor. While respondents and the traveling public were suffering irreparable harm during the City's unending delays, the City will suffer no harm by reason of the October 17 Order.

Respondents' likelihood of success on the merits is evidenced by the host of decisions which, contrary to the City's assertions, have struck down proprietor limitations on airport flight access which were not justified by noise emissions concerns.[6] *See, e.g., Concorde II,* 564 F.2d at

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[6]In its Petition the City erroneously implies that the district court's order "compel[s] a municipal proprietor to raise a reasonably established ceiling on maximum permissible noise in order to accommodate the interests of interstate commerce." Petition at 9. Nothing could be further from the truth. All of the evidence before the district court, and the City's own admissions, *see* Petition at 8, n.8, recognize that at least 32 and probably 41 or more flights can be accommodated at the Airport without exceeding the 65 db CNEL limit. The district

1010-12 (2d Cir. 1977) (striking down prohibition on landing of Concorde aircraft which was not related to noise concerns); *United States v. County of Westchester,* 571 F. Supp. 786, 797 (S.D.N.Y. 1983) (striking down ban on all night flights regardless of aircraft noise level when proprietor provided no data that ban was necessary to noise concerns); *United States v. New York,* 552 F. Supp. 255, 265 (N.D.N.Y. 1982) (same); *Santa Monica Airport Association v. City of Santa Monica,* 481 F. Supp. 927, 943-44 (C.D. Cal. 1979), *aff'd,* 659 F.2d 100 (9th Cir. 1981) (striking down noise provisions which were applied to jet aircraft but not propeller aircraft as arbitrary and discriminatory). The City has chosen an unreasonable and arbitrary limit of 18 commercial flights per day. Because, as the City admits, additional flights can be accommodated without exceeding the 65 db CNEL limit in noise sensitive areas, both the district court (Appendix "E"), as affirmed by the Ninth Circuit (Appendix "B"), and the FAA ("Record of Approval," Appendix "G") have recognized that the City's arbitrary limit on commercial flights is not rationally related to legitimate noise concerns.

The unreasonable and discriminatory nature of the City's rejection of all expert evidence regarding flight limits in adopting the Ordinance can best be illustrated by two examples. First, it insisted that no general aviation flights be shifted to Runway 25L. While this shift is not necessary to accommodate the 26 flights per day authorized by the district court, *see* "Orth Affidavit" (E.R. 715-16), it is typical of the City's arbitrary and unreasonable attempts to limit commercial flights at the Airport. The City suggests that this decision is based

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court's order did not raise the 65 db CNEL limit, and the evidence shows that flight activities under the preliminary injunction will not exceed this noise limit.

upon the "reasonable" decision not to shift jet noise to another "area" of the City. Petitioners do not disclose to this Court, however, that this "area" of the City is composed predominately of the San Diego Freeway and manufacturing zones surrounding that freeway. *See* "CNEL Contours For Fiscal Year 1984" (E.R. 556). Second, the City decided to leave general aviation flights which account for roughly 40% of the noise at the Airport virtually unregulated, while the City imposed flight limits and stringent noise limits on commercial carriers. It is exactly this type of irrational and arbitrary behavior on the part of the City which raised serious doubts about the Ordinance and the reasonableness of continuing to restrict commercial flights at the Airport. Thus, the City's Ordinance will be struck down because it is arbitrary and discriminatory, and because it unduly burdens interstate commerce.

CONCLUSION

For the reasons stated above, the City's Petition for Certiorari should be denied.

Dated: July 10, 1987

Respectfully submitted,

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* Counsel of Record.

APPENDIX A

Notice of Order of Justice O'Connor Denying Application for Stay Pending Petition for Writ of Certiorari

Supreme Court of the United States

Filed: May 4, 1987

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

May 4, 1987

John R. Calhoun, Esquire
Roger P. Freeman, Esquire
Lee L. Blackman, Esquire
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
707 Wilshire Boulevard
14th Floor
Los Angeles, CA 90017

Re: City of Long Beach, et al. v. Aircal, Inc., et al., A-791

Gentlemen:

Your application for a stay pending the timely filing and disposition of a petition writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who has endorsed thereon the following:

"Denied
Sandra D. O'Connor
5/4/87"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Christopher W. Vasil
Deputy Clerk

vjr

cc: Hon. Charles Fried, Solicitor General
John E. Gillick, Esq.
George A. Juarez, Esq.
James Perona, Esq.
William A. Masterson, Esq.
John J. Lyons, Esq.
Richard M. Sherman, Jr., Esq.
George H. King, Esq.
Robert S. Span, Esq.
Samuel A. Keesal, Jr., Esq.

APPENDIX B

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit

Alaska Airlines, Inc., Plaintiff-Appellee v. City of Long Beach, Defendant-Appellant; Long Beach Unified School District, Defendant-Intervenor v. Pacific Southwest Airlines et al., Plaintiffs-Intervenors-Appellees; Alaska Airlines, Inc., Plaintiff-Appellee and Pacific Southwest Airlines et al., Plaintiffs-Intervenors-Appellees v. City of Long Beach, et al., Defendants-Appellants.

Ninth Circuit Nos. 86-6661, 86-6662.

Filed: April 14, 1987.

Appeal from: United States District Court, Central District of California (DC No. CV 83-4065 LEW (Bx)).

BEFORE: WRIGHT AND REINHARDT, Circuit Judges, and MUECKE**, District Judge

In 1983 the district court issued a preliminary injunction requiring the City of Long Beach, operator of the Long Beach airport, to permit a minimum of eighteen commercial flights per day in and out of the airport. Long Beach appealed from that order. At Long Beach's request, the appeal was recently dismissed, without prejudice, subject to reinstatement by this panel. In 1986, relying on a newly enacted noise abatement ordinance, Long Beach asked the district court to vacate the preliminary injunction. Plaintiffs include both air carriers who have historically used the Long Beach airport and "new entrant" carriers who have sought for some time to use the airport for commercial flights. At the same time the City of Long Beach moved to vacate the 1983 preliminary

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** Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

injunction, the "new entrant" carriers asked the court to amend the injunction by increasing the minimum number of permitted flights. The district court refused Long Beach's request to vacate the preliminary injunction and amended that order by increasing the number of permitted flights from eighteen to twenty-six per day. The additional flights were subsequently awarded to the "new entrant" carriers. Long Beach now appeals the 1986 actions of the district court.

We review the district court's actions under an abuse of discretion standard. *Sports Form Inc. v. United Press International*, 686 F.2d 750, 753 (9th Cir. 1982). *See also Los Angeles Memorial Coliseum Com'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). We affirm.

In refusing to vacate the preliminary injunction, the district court concluded that serious questions were raised regarding the legality of the newly enacted noise ordinance which contained a nonseverability clause. The district court also concluded that the City had failed to formulate any plans for improvement of the airport facilities. The district court took careful note of the various interests of all parties involved, including the residents of the City of Long Beach. It also recognized the authority of city airport proprietors "to enact reasonable nonarbitrary and nondiscriminatory airport access ordinances." With respect to the request to increase the minimum number of permitted flights, the district court found that "[a]ny further delay in this matter [would be] unreasonable".

We note, preliminarily, that in issuing the 1983 preliminary injunction the district court did not abuse its discretion and applied the proper legal standards. With respect to its refusal to vacate the 1983 injunction, we conclude that the district court's action was well within its discretion. We cannot say that the district court committed a

clear error of judgment nor do we have a firm conviction that a mistake has been committed with respect to any factual matters. A decision as to the validity of the newly enacted noise ordinance must await a trial on the merits. At that time the court can carefully examine the ordinance and its effects, as well as the available alternatives, in light of *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), and *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002 (2d Cir. 1977). Similarly, with respect to increasing the number of permitted flights, we conclude that the district court committed no legal error and acted within its discretion. The appropriate minimum number of flights to be permitted in 1987, as opposed to 1983, is a matter as to which we would hesitate to substitute our judgment for that of a district court. In reaching this conclusion we read the 1986 order in light of the findings and conclusions issued in support of the 1983 injunction.

There are two additional points we wish to note. First, our decision indicates no view as to the ultimate answer to any questions involved in this case. Our standard of review for preliminary injunctions is different from that applicable to permanent injunctions. Second, the preliminary injunction that was recently amended was issued a number of years ago. The purpose of preliminary injunctions is to ensure that the parties comply with appropriate conditions pending resolution of the case on the merits. Preliminary injunctions are not intended to be of indefinite duration. Within a reasonable time the parties should bring their dispute to trial on the merits or arrive at an appropriate settlement.

AFFIRMED.

APPENDIX C

Order of the United States District Court for the Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserv, Air California, Western Airlines, Inc., America West Airlines, Inc., American Airlines, Inc., United Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Ed Tuttle, and Warren Harwood, Defendants, Long Beach United School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: April 27, 1987.

United States District Court, Central District of California (No. CV 83-4065 LEW (Bx)).

Order: 1. Establishing a Discovery Cut-off date of July 31, 1987; 2. Setting the Pre-Trial Conference for September 14, 1987 at 11:00 a.m.; 3. Setting November 10, 1987 at 9:00 a.m. as the trial date; 4. Re: Preparation for July Trial.

DISCOVERY CUT-OFF:

The Court has established a cut-off date for discovery in this action. All discovery is to be completed on, or prior to, the cut-off date. Accordingly, the following discovery schedule shall apply in this Court:

1. Depositions: All depositions shall be scheduled to commence at least five (5) working days prior to the discovery cut-off date. A deposition which has commenced five (5) days prior to the discovery cut-off date may continue beyond the cut-off date, as is necessary.

2. Interrogatories: All interrogatories must be served at least forty-five (45) days prior to the discovery cut-off date. The Court will not approve stipulations between counsel which permits responses to be served after the cut-off date except in unusual circumstances and upon a showing of good cause.

3. Production of Documents, etc.: All requests for production, etc., shall be served at least forty-five (45) days prior to the discovery cut-off date. The Court will not approve stipulations between counsel which permit responses to be served after the cut-off date except in unusual circumstances and upon a showing of good cause.

4. Requests for Admissions: All requests for admissions shall be served at least forty-five (45) days prior to the discovery cut-off date. The Court will not approve stipulations between counsel which permit responses to be served after the cut-off date except in unusual circumstances and upon a showing of good cause.

5. Discovery Motions: Any motion respecting the inadequacy of responses to discovery must be filed and served not later than ten (10) days after the discovery cut-off date. *The Court requires strict compliance with the requirements of Local Rule 7.15 in the preparation and filing of discovery motions.* Whenever possible, the Court expects counsel to resolve discovery problems among themselves in a courteous, reasonable, and professional manner. Consistent resort to the Court for guidance in discovery is generally unnecessary.

PRE-TRIAL CONFERENCE:

This case has been placed on calendar for a Pre-Trial Conference pursuant to F.R.Civ.P. 16 and Local Rule 9. Unless excused for good cause, each party appearing in this action shall be represented at the Pre-Trial Conference, and all pre-trial meetings of counsel, by the attorney

who is to have charge of the conduct of the trial on behalf of such party.

STRICT COMPLIANCE WITH THE REQUIREMENT OF LOCAL RULE 9 IS REQUIRED BY THE COURT. Therefore, carefully prepared Memoranda of Contentions of Fact and Law, Witness List, Exhibit List, and a proposed Pre-Trial Conference Order shall be submitted in accordance with the provisions of Local Rules 9.5 through 9.8 and the form of the proposed Pre-Trial Conference Order shall be in conformity with the format set forth in the Appendix to Local Rule 9.

The Memoranda of Contentions of Fact and Law are due twenty-one (21) days before the Pre-Trial Conference and the proposed Pre-Trial Conference Order is to be lodged seven (7) days before the Pre-Trial Conference.

TRIAL PREPARATION FOR JURY TRIAL — INSTRUCTIONS AND EXHIBITS:

THE COURT ORDERS that counsel comply with the following in their preparation for trial:

Thirty-five (35) days before trial, plaintiff shall serve his proposed jury instructions on defendant. Twenty-eight (28) days before trial defendant shall serve on plaintiff, his objections to plaintiff's instructions together with an [sic] additional instructions defendant intends to offer. Twenty-one (21) days before trial, counsel are ordered to meet and confer to attempt to come to agreement on the proposed jury instructions.

Fourteen (14) days before trial counsel shall file with the Court a JOINT set of jury instructions on which there is agreement. Defendant's counsel has the burden of preparing the joint set of jury instructions. At the same time, each party shall file its proposed jury instructions

which are objected to by any other party, accompanied by points and authorities in support of those instructions.

Seven (7) days before trial counsel are to file points and authorities supporting their objections to any other parties' proposed jury instructions.

The Court prefers the use of Devitt & Blackmar instructions as modified or supplemented to fit the circumstances of this case. Each requested instruction shall be set forth in full; be on a separate page; be numbered; cover only one subject or principle of law; not repeat principles of law contained in any other requested instructions; and cite the authority for a source of the requested instruction.

During the trial and before argument, the Court will meet with counsel and settle the instructions plus any others deemed warranted by unexpected developments during the course of the trial.

Counsel are to *prepare their exhibits* for presentation at the trial by placing them in volumes which are tabbed down the side or across the bottom with the exhibit numbers. These volumes are to be prepared in an original and three copies. Each volume of exhibits shall be bound across the top with an Acco type fastener and contain a list of each exhibit included in the volume. Counsel shall also supply two extra copies of their exhibit list to the Clerk at the start of trial. The exhibits are to be numbered in accordance with Local Rule 8.

All counsel are to meet not later than ten (10) days before trial and to stipulate as far as is possible as to foundation, waiver of the best evidence rule, and to those exhibits that may be received into evidence at the start of trial. The exhibits to be so received will be noted on the extra copies of the exhibit lists.

The Clerk is ordered to serve a copy of this order by mail on all parties to this action.

DATED _____

_____

LAUGHLIN E. WATERS
United States District Judge

APPENDIX D

Order of the United States District Court for the Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserv, Air California, Western Airlines, Inc., America West Airlines, Inc., American Airlines, Inc., United Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Ed Tuttle, and Warren Harwood, Defendants, Long Beach Unified School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: January 15, 1987.

United States District Court, Central District of California (No. CV 83-4065 LEW (Bx)).

Order Re: The Allocation of Eight New Flights Authorized by the Court's Order of October 17, 1986.

On October 17, 1986, this Court filed an Order denying the motion of the City of Long Beach to vacate this Court's preliminary injunction of December 9, 1983 and granting the plaintiff airlines' motions to modify that injunction. The Court ordered an increase of eight (8) daily flights at Long Beach Airport and invited the City, the airlines, and interested parties to submit proposals concerning the allocation of those flights. On January 5, 1987, a hearing was held to consider the allocation strategies proposed by the parties, and the Court subsequently took the matter under submission. After considering the papers submitted in connection with the matter and the arguments of the parties at the hearing, the Court finds as follows.

In its proposal regarding the allocation of the new flights, the City determined that all eight (8) daily flights should be allocated to new entrant air carriers AirCal, Western, America West, and Ozark. The City further determined that flights should be allocated in groups of two. Such a preferential allocation in favor of the new entrants comports with the Congressional policy of increasing competition in the airlines industry. 48 U.S.C. § 1302. The City formulated its allocation plan after examining the competing interests of the various parties in this litigation. The plaintiff airlines and the Federal Aviation Administration agree with the City that the new entrant carriers should receive a preference with respect to the allocation of the eight (8) new daily flights. Despite the arguments made by parties which have recently joined this litigation as *amicus curiae*, this Court cannot conclude that the City's proposal is arbitrary, unreasonable, unlawfully discriminatory, or in violation of its administrative authority as proprietor of the airport. *Santa Monica Airport Association v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *affirmed*, 659 F.2d 100 (9th Cir. 1981).

Accordingly, it is hereby ordered that the preliminary injunction of December 9, 1986 is modified such that pending trial in this matter and in the absence of a reasonable and non-discriminatory plan governing access to Long Beach Airport, the City of Long Beach is enjoined from directly or indirectly reducing the daily flights operated by the air carriers below the numbers provided herein:

Alaska Airlines	3
PSA	4
Jet America	6
American Airlines	3
United Airlines	2
Western Airlines	2

AirCal	2
America West	2
Ozark Airlines	2

It is further ordered that the above allocations must be operated with Stage III aircraft as defined in 14 C.F.R. Part 36.

It is further ordered that the City present to this court a rational plan for use of airport facilities to accommodate the eight (8) new daily flights by January 26, 1987. The City shall implement the Court-ordered flight schedule no later than March 1, 1987.

IT IS SO ORDERED.

Dated: January 15, 1987

Laughlin E. Waters
Sr. United States
District Judge.

APPENDIX E

Order of the United States District Court for the Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserv, Air California, Western Airlines, Inc., America West Airlines, Inc., American Airlines, Inc., United Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Ed Tuttle, and Warren Harwood, Defendants, Long Beach Unified School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: October 17, 1986.

United States District Court, Central District of California (No. CV 83-4065 LEW (Bx)).

Order Re: City of Long Beach's Motion to Vacate The Preliminary Injunction And The Plaintiff Airlines' Motions To Modify The Preliminary Injunction.

The City of Long Beach's motion to vacate the preliminary injunction of December 9, 1983 and the motions by AirCal, Western, America West, United, Jet America and Alaska to modify that injunction came on for hearing on September 8, 1986. After oral argument, the Court denied the City's motion and took the airlines' motions under submission. The Court has considered all of the papers submitted in connection with this matter and has considered the arguments made by counsel at the hearing. The Court hereby grants the airlines' motions to modify the preliminary injunction and orders an increase of (8) daily flights at Long Beach Airport — from the current total of eighteen (18) daily flights to twenty-six (26) daily flights.

As a preliminary matter, the Court recognizes the diversity of interests involved in this case. The residents of the City of Long Beach seek to minimize the volume and number of noise intrusions by airplanes serving the airport. Those interests clash with the airlines' goal of increasing the number of flights at the airport. To complicate matters, the air carriers themselves differ as to how such additional flights should be allocated. AirCal, Western, America West and Ozark — the "new entrants" — seek to institute service at Long Beach Airport, an opportunity the City has persistently denied them during the course of this litigation. Allocating flights to the new entrants, they point out, furthers the policy stated in the Airline Deregulation Act of 1978, 48 U.S.C. § 1302, of increasing competition in the airline industry. The City acknowledges the new entrants' point in the most recent noise compatibility ordinance, which provides for the preferential allocation of new flights to the new entrants.

Conversely, the airlines presently serving Long Beach Airport request that any additional flights be granted to them. They contend that, like the new entrants, they too have patiently awaited the flight increases. Moreover, they argue that their flight allotment should be increased in return for the business risk they undertook in establishing service at the airport.

The interest of the general public must also be considered. The welfare of the Long Beach residents demands a well-planned growth policy at the airport. Such a growth policy must also account for the public's interest in a vibrant national transportation system — a linchpin of our national system of commerce.

The Long Beach City Council has the formidable job of balancing these diverse interests. As political representatives of the city and proprietors of the airport, they are answerable politically to city residents and responsible

legally for lawsuits brought due to excessive noise. In addition, they must attend to the interest of the airlines, the public and the national commercial system. The courts, recognizing these responsibilities, have granted city airport proprietors the power to enact reasonable, non-arbitrary and non-discriminatory airport access ordinances. *Santa Monica Airport Ass'n. v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 647 F.2d 3 (9th Cir. 1981).

Upon careful consideration, the Court finds that the record raises serious questions as to the reasonableness and fairness of the City's program to limit growth at Long Beach Airport. These questions are amplified by the City's failure to formulate a plan for improvement of airport facilities after almost two years of studying the airport access problem. Thus, the Court denies the City's motion to vacate the injunction and enact its new airport access ordinance.

The Court further orders an increase of eight (8) daily flights at the Long Beach Airport. The record clearly shows that new flight activity at the airport is justified. Even the City concedes in its new ordinance that a total of thirty-two (32) daily flights can be accomodated at the airport. Moreover, the Part 150 study task force — a City-appointed group that extensively studied the issues of noise and access — recommended that a total of forty-one (41) daily flights could be handled. While an FAA review of the task force recommendations would add another objective analysis to the voluminous data, such a study would also add *at least* another six months of delay to this protracted litigation. Any further delay in this matter is unreasonable, defeats the public interest and contradicts the Congressional policy of a vibrant and competitive airline industry.

The City is invited to submit a proposal as to the method of allocation of these additional eight (8) daily flights. Such a proposal should address the interests aforementioned in this Order and be submitted by November 7, 1986. Upon receipt of the City's recommendations, comments will be solicited from all interested parties.

IT IS SO ORDERED

DATED: October 17, 1986

LAUGHLIN E. WATERS
Sr. United States
District Judge

APPENDIX F

Order of the United States District Court for the Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserve, Air California, Western Airlines, Inc., America West Airlines, Inc., American Airlines, Inc., United Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Ed Tuttle, and Warren Harwood, Defendants, Long Beach Unified School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: December 12, 1983

United States District Court, Central District of California (No. CV 83-4065 KEW (Bx)).

Order Re: Preliminary Injunction.

Upon consideration of the Motions for Preliminary Injunction brought by Alaska Airlines, Inc., Pacific Southwest Airlines, Inc. and Jet America Airlines, Inc., and the Court being fully advised in those matters, it is hereby ORDERED that the Motions be and further are granted and it is further ORDERED that pending trial in this matter and in the absence of a nonexclusive, nondiscriminatory plan governing access to Long Beach Municipal Airport, the City of Long Beach is enjoined from

directly or indirectly reducing the daily flights flown by the air carriers below the numbers set forth herein:

Alaska Airlines	3
PSA	4
Jet America	6
American Airlines	3
United Airlines	2

Entered this 9th day of December, 1983.

LAUGHLIN E. WATERS
United States District Judge

APPENDIX G

Federal Aviation Administration Record of Approval, FAR Part 150 Noise Compatibility Program, Long Beach Airport, Long Beach, California.

Date: March 27, 1987.

RECORD OF APPROVAL

LONG BEACH AIRPORT
NOISE COMPATIBILITY PROGRAM

PRINCIPLES

1. Long Beach Airport should only be used by Stage 3 (or equivalent) aircraft, of a size not to exceed the rated runway parameters.

Disapproved. The designation of aircraft equipment permitted at Long Beach Airport under its Part 150 program is directly related to the establishment of acceptable single-event limits which are supported by adequate analysis and meet Part 150 standards. FAA has disapproved Long Beach's proposed SENEL limits for reasons stated under Element 12.B-1. Also noted under Element 12.B-1 is that FAA is not, by virtue of its disapproval, opposing the concept of single-event noise limits at Long Beach so long as those limits are supported by adequate analysis, satisfy the standards for approval under Part 150, and are administered in a manner consistent with aviation safety. Whether or not acceptable noise limits at Long Beach airport would translate into "Stage 3 (or equivalent) aircraft" remains to be documented by Long Beach.

2. 65 CNEL should be adopted as the critical noise level in conformance with state law as recommended by the Task Force. No operations should be permitted which would have the effect of exposing incompatible land use outside the airport to greater than this noise level.

Disapproved. The FAA does not take issue with Long Beach's target goal of attaining compatibility of land uses within the 65 CNEL contour. This is also the goal, to the extent possible, expressed in the DOT/FAA Aviation Noise Abatement Policy of 1976 and in FAR Part 150. Rather, FAA's disapproval is based on Long Beach's selected means of achieving this goal coupled with the lack of adequate analytical support in its Part 150 documentation.

Long Beach's selected means of achieving its goal is to prevent aircraft operations from exposing noncompatible land uses outside the airport to greater than 65 CNEL. There is no corresponding constraint on land uses in terms of eliminating existing noncompatible land uses and preventing the introduction of additional noncompatible land uses within the 65 CNEL. In other words, the burden of attaining Long Beach's target goal falls entirely on air commerce. This was, to the best of FAA's knowledge, a guiding principle of Long Beach's Part 150 study from its initiation, and this predetermined outcome was not subjected to sufficient analysis to make an informed judgment on the burden on interstate commerce or to satisfy the Part 150 standard of meeting both local needs and needs of the national air transportation system, to the extent practicable, considering tradeoffs between economic benefits derived from the airport and the noise impact.

Long Beach's Part 150 analysis attempts to address noncompatible land use impacts and costs (in terms of the number of dwellings significantly impacted and the

financial cost of reducing that impact through sound attenuation) for selected 65 CNEL contour locations, but does not include a corresponding impact and cost analysis with respect to air commerce. Within the 65 CNEL of Long Beach's current noise exposure map submitted to FAA under Part 150 in July 1986 (although prepared based on 1984 data), Long Beach estimates an impact of 1,586 dwelling units and a potential sound attenuation cost of $6.7 million. Since, at the time this noise exposure map was prepared, Long Beach Airport had, and continues to have, in place a significant restriction on the number of air carrier operations permitted at the airport, it is already placing a burden on air commerce. However, Long Beach's Part 150 program does not address the commerce impacts of simply maintaining that 65 CNEL contour in its location as presented in the July 1986 map so that commerce benefits and impacts could be judged and could be compared to noise impacts and mitigation costs. Similarly, for the critical 5-year forecast map also submitted to FAA under Part 150 in July 1986, which is based on implementation of Long Beach's Part 150 program, the number of dwellings and the potential sound attenuation costs within the 65 CNEL are zero; however, there is no adequate analysis of the impacts on commerce and on economic benefits derived from the airport of achieving a zero land use impact. It cannot be assumed that there would be no impacts on commerce simply because Long Beach proposes to allow an increase in the number of daily air carrier flights from 18 to 32, while shrinking the 65 CNEL contour due to service by quieter aircraft and noise abatement procedures. Long Beach's Part 150 documentation indicates that its proposed 32 daily air carrier flights will still translate into the airport's accommodating less than 2.5 million annual passenger demand forecast by its consultant for 1990. Between 1990 and 2000, FAA has roughly estimated that the gap

between passenger demand and passengers accommodated at Long Beach Airport is likely to double if Long Beach's recommendation is approved.

A major difficulty in quantifying the impact on commerce of a proposed noise cap at Long Beach is that Long Beach's starting point; i.e., their current situation, is already a restricted air carrier operating environment. In this type of situation, any permitted growth may appear to be a relief for air commerce, rather than a burden. For their Part 150 effort, FAA encouraged Long Beach to analyze an unrestricted environment at the airport for comparative purposes. Long Beach's response within the Part 150 study is its problem definition case showing the airport serving 8.7 million annual passengers, which was translated into approximately 125 air carrier flights a day. Under this scenario within Long Beach's Part 150 program which assumes unrestricted airport use based on theoretical runway capacity and no noise abatement actions, 18,100 dwelling units would be impacted within the 65 CNEL contour involving a potential sound attenuation cost of $146 million (sound attenuation costs are the only costs estimated by Long Beach's program). The burden on commerce would be nonexistent since 8.7 million annual passengers would be almost twice the number roughly projected by FAA to utilize an unrestricted Long Beach Airport by the year 2000. This "worst case scenario" is the only one within Long Beach's Part 150 study in which the FAA is able to see a commerce/noise impact comparison. This worst case is not a noise scenario which either the City or FAA desires for Long Beach Airport, and it is not a particularly useful comparative alternative. FAA believes that Long Beach either ignored or gave short shrift to other reasonable comparative alternatives.

The FAA is not, by virtue of this disapproval, opposing the concept of a target 65 CNEL noise contour at Long Beach Airport so long as it is supported by adequate analysis and meets the standards for approval under part 150. In addition to further analysis with respect to air commerce to correct the deficiencies noted above, the FAA recommends that Long Beach include a balanced, comparative analysis for other reasonable alternatives including (but not necessarily limited to) splitting the 65 CNEL contour difference between the current and 5-year forecast noise exposure maps which would result in noise benefits to the community with less apparent impact on commerce than the 5-year map 65 CNEL contour; and include a balanced, comparative analysis for the alternatives of meeting reasonable forecast passenger demand levels for the years 1990, 1995, and 2000. The FAA is available to work cooperatively with Long Beach to develop and analyze alternatives with the goal of producing a recommendation which would be approvable under Part 150.

This disapproval only relates to FAA determinations under FAR Part 150 and to the standards expressed in that regulation.

3. Within the ability of the city, the hourly density of scheduled airline and other flights using transport category and similar noise level aircraft, should be minimized.

Disapproved. The hourly density of flights is not reasonably related to the reduction of noise over noncompatible land uses when considered either on a cumulative basis (CNEL) or a single-event level (SENEL). Absent information which indicates a relationship between the hourly density of flights and its impact on noise, safety,

congestion, and commerce, it appears that it is not within the authority of the city to carry out such a policy.

4. Airport Federal funds (consistent with City Council policy) should be used to minimize the noise impact on the community.

Approved, subject to applicable Federal laws with respect to the expenditure of revenues generated by the airport. With respect to Federal funds, 150.5(b) states that approval of a noise compatibility program is neither a commitment by FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from FAA. Specific applications for Federal aid must meet all applicable regulations, directives, and guidelines.

ELEMENTS

1. In each quarter that the 65 CNEL noise level is exceeded, a noise reduction in flight activity in proportion to noise contribution by each user group will occur. For scheduled carriers, there will be a reduction of 2 flights from the carrier with the highest average noise level. With other users, elimination of the noisiest aircraft will occur.

Disapproved. A predetermined reduction in the number of flights is not necessarily reasonably related to the goal of maintaining a particular criterion noise level since different aircraft produce different noise levels. In the case of Long Beach Airport, the basis for establishing their proposed criterion noise level was not adequately analyzed or supported in their Part 150 documentation, as described in FAA's determination on Principle 2. Neither is there technical information in the Part 150 program to support the proposal to reduce by two air

carrier flights in any quarter in which the 65 CNEL has been exceeded. Furthermore, the Part 150 documentation fails to address impacts on interstate commerce from the elimination of flights from a market which is presumed in Long Beach's Part 150 program to be already restricted to a maximum of 32 daily flights.

2. In each quarter that the 65 CNEL criterion noise level is within the boundaries of compatible land use, up to 2 flights will be added. Each increment of up to 2 flights shall only go to one operator. Incremental flights shall be awarded with preference to new entrants. On an annual basis, City Council shall review reasonableness of timing and magnitude of increments.

Disapproved. A predetermined addition to the number of flights is not necessarily reasonably related to achieving a particular criterion noise level since different aircraft produce different noise levels. Long Beach's Part 150 documentation does not substantiate the reasonableness of restricting flight increases to two per quarter relative to its presumed 65 CNEL criterion noise level, which is also disapproved for reasons stated under Principle 2. Furthermore Long Beach's proposal, as FAA understands it, to dole out increases in increments of two flights per quarter, would require seven quarters to go from their present level of 18 flights to their proposed criterion noise level of 32 flights. Preventing timely use of a substantial portion of Long Beach's presumed number of available flights within their proposed criterion noise level is unreasonable, arbitrary and capricious, and may constitute a burden of interstate commerce. Long Beach's Part 150 documentation does not analyze the potential burden on commerce in this regard.

3. There shall be a maximum of 32 daily scheduled commercial airline flights pending a further review within one year by the City Council regarding the issue of frequency of noise intrusions.

Disapproved. Assuming that a particular criterion noise level would be acceptable, it would still not be acceptable for Long Beach to predetermine the maximum number of flights available to the air carriers to meet that criterion. Different aircraft produce different noise levels. Long Beach's number of 32 flights is based on their calculation of numbers of MD-80 and B-767 aircraft that could be accommodated within their proposed criterion noise level, using an aircraft mix of 90 percent MD-80's and 10 percent B-767's. However if, for example, BAE-146 type aircraft were substituted for either MD-80 or B-767 aircraft, the number of flights that could be accommodated within the same criterion noise level would be greater than 32. Long Beach's Part 150 documentation does not substantiate that a maximum number of 32 daily flights is reasonably related to achieving its target 65 CNEL criterion, even if that criterion were acceptable. FAA's disapproval of that criterion as proposed by Long Beach is addressed under Principle 2, including FAA comments with respect to Long Beach's lack of adequate analysis within its Part 150 program on the impact on interstate commerce of establishing a maximum ceiling on airport operations.

4. A monetary fee structure for SENEL (single event noise level) violations, the severity of which would provide for a significant deterrent (an initial warning, then $3,000 for the 2nd violation, then $5,000 for the 3rd violation within any one year period), shall be implemented.

Disapproved. The FAA opposes the use of an in situ SENEL measurement for reasons of aviation safety. Aircraft pilots attempting to achieve a lower SENEL value as they fly over a monitoring station may engage in aircraft maneuvers which are detrimental to safety. FAA's safety concerns in this regard are increased by the proposed imposition of severe financial penalties which will further encourage pilots to attempt to "beat the box." Additionally, the use of in situ SENEL measure it combined with a financial penalty system is unreasonable because the noise created by individual flyovers by the same pilot in the same aircraft is not subject to reasonable reproducibility because of extraneous factors affecting a "noise event" beyond the control of the pilot, including temperature, humidity, cloud cover, and other atmospheric conditions.

5. More stringent nighttime SENEL limits will be effective between the hours of 10:00 p.m. – 7:00 a.m. as opposed to current nighttime limit enforcement hours of 10:30 p.m. – 7:00 a.m.

Disapproved. FAA's objections to in situ SENEL measurement are described under Element 4. Specifically with respect to Long Beach's proposed time extension, there is not sufficient information in the Part 150 program to permit an informed analysis under Section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. Based on Long Beach's documentation, the FAA is unable to determine the benefit of the proposed measure in terms of reduction of noise over noncompatible land uses. Long Beach's Part 150 documentation refers to a resulting "relatively small impact on CNEL values" and states that there are not accurate records of the existing number of operations occurring between 10:00 p.m. and 10:30 p.m. In addition, FAA is unable to determine from Long Beach's documentation whether there would be an

undue burden on interstate commerce because of the absence of the information on benefits versus impacts on aviation users. FAA is aware that a broadening of the "curfew hours" from 10:30 p.m. to 10:00 p.m. would eliminate the half-hour "grace period" allowed to the air carriers who, by informal agreement, schedule arrivals and departures before 10:00 p.m. There is a general statement in Long Beach's documentation that extension of the "curfew hours" would probably necessitate considerable adjustment of airline schedules; however, FAA has been unable to locate any analysis in Long Beach's program that provides a more definitive understanding of the impact on the carriers or other users.

6. A landing and departure fee for all aircraft operations between the hours of 10:p.m. – 7:00 a.m. the amount of which would be in proportion to the community annoyance factor in CNEL calculation (10 times daytime landing fee for equivalent aircraft) shall be implemented.

Disapproved, pending submission to FAA under Part 150 of sufficient information to permit an informed analysis under section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. While the concept of noise-based operating fees may be acceptable under Part 150, Long Beach's Part 150 documentation has not shown that the imposition of nighttime noise-based landing and departure fees is reasonably related to the goal of reducing noise over noncompatible land uses when considered in conjunction with other proposed measures in Long Beach's program which, if approved as proposed, would contain the 65 CNEL contour so that there would be no noncompatible land uses and would further impose nighttime SENEL limits that would eliminate all except single-engine low performance aircraft from the airport at night.

Long Beach's proposal as stated is also technically flawed. The proposal is for a nighttime fee equal to 10 times a daytime fee "in proportion to the community annoyance factor in CNEL calcuation." The factor referred to actually reflects that the CNEL methodology penalizes nighttime aircraft operations by 10 dB to balance the generally assumed nighttime ambient noise level of 10 dB lower than the daytime level. However, 10 dB represents twice the perceived loudness of a daytime noise event, not ten times the perceived loudness or annoyance, and therefore a multiplying factor of only 2. While it is not FAA's intention to make detailed judgments under Part 150 with respect to proposed fee structures, there must be adequate information in a Part 150 program supporting the reasonableness of proposed noise-based fees in relation to the aircraft noise generated as well as to the goal of reducing noise/noncompatible land uses.

7. Regarding preferential runway use, the FAA should be asked to allocate runway use so that no neighborhoods would be exposed to a greater airport-related CNEL than is currently the case. This would preclude use of Runway 25L by most business jets.

Disapproved. The goal of this measure is dependent upon an acceptable CNEL criterion noise level. FAA has disapproved Long Beach's proposed target 65 CNEL noise criterion for reasons stated under Principle 2. Element 7 cannot be acted on by FAA under Part 150 absent resolution of Principle 2. FAA also notes that whether or not particular aircraft would be allowed to use Runway 25L for noise reasons should depend on their conformance with an acceptable CNEL criterion noise level for the airport or with acceptable single-event noise limits on that runway, not on whether the aircraft are business jets.

8. The City should, using airport and/or Federal funds, embark on a pilot public building acoustical treatment program.

Approved, subject to applicable Federal laws with respect to the expenditure of revenues generated by the airport. With respect to Federal funds, 150.5(b) states that approval of a noise compatibility program is neither a commitment by FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from FAA. Public buildings located in areas below 65 CNEL are already considered compatible under Part 150 land use guidelines (Table 1 of Appendix A) and would not be eligible for Federal aid.

9. Nighttime SENEL limits which would preclude the airport's use by aircraft which have historically caused community disruption during nighttime hours should be developed and implemented.

Disapproved. While the recommendation indicates that a nighttime limit *should* be developed and implemented ([italics] added), it is FAA's understanding based on Long Beach's Part 150 documentation that a proposed nighttime limit of 79.0 SENEL for Runway 12/30 has already been developed by Long Beach and included in a proposed local ordinance. The FAA disapproves the use of an in situ SENEL measurement for reasons addressed in response to Element 4. The FAA also disapproves this proposed measure with respect to Long Beach's selection of their nighttime limit based on insufficient information to permit an informed analysis under Section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. FAA is unable to determine from Long Beach's documentation the contribution of the lowered nighttime limit to the goal of reducing noise over noncompatible land uses (i.e., how many individuals or

households would be benefitted). FAA is unable to determine from the documentation the impact on interstate commerce caused by excluding from Long Beach Airport 41 percent of the present night operations. FAA considers the methodology used by Long Beach also to provide grounds for disapproval because it was not adequate to produce a nighttime limit that is not subject to being arbitrary and capricious. Long Beach apparently reviewed nighttime noise complaints at the airport over a 5-month period (January-May 1984) and, on the basis of an extremely small number of nighttime complaints, established a limit to eliminate "obstrusive noise" with no further analysis provided such as to correlate noise levels with sleep interference or other annoyance criteria (although there is some discussion of sleep interference in Long Beach's documentation). Additionally, there are statements in Long Beach's Part 150 documentation that the existing nighttime limits effectively limit nighttime intrusions and that there is no basis on which to set new limits.

The FAA is not, by virtue of this disapproval, opposing the concept of single-event noise limits at Long Beach so long as those limits are supported by adequate analysis, meet the standards for approval under Part 150, and are administered in a manner so that aircraft are pre-identified as meeting or not meeting the limits (as occurs when using a dBA limit and applying FAA Advisory Circular 36-3D, "Estimated Airplane Noise Levels in A-Weighted Decibels"), instead of relying on individual pilot/aircraft performance in flight.

10. There should be no variances granted from the requirement to pay established late night operating fees, pursuant to elements #4, #5, and #6 above.

Disapproved. Implementation of this measure is dependent upon the implementation of Elements 4, 5, and 6, which are disapproved.

11. FAA should contribute towards noise compatibility by:

(a) Revising or eliminating the existing approach to Runway 12.

(b) Not permitting practice ILS approaches.

(c) Restricting traffic pattern size when warranted due to noise abatement.

(a) *Disapproved.* FAA understands this item to refer to the circling approach to Runway 12 under actual or simulated instrument flight conditions after an initial instrument approach to Runway 30. As stated in Long Beach's Task Force findings, this circling approach is necessary to keep the airport open during certain weather/wind conditions. Because of airspace limitations, it is not possible to have a precision approach to Runway 12 and thereby avoid the circling approach.

(b) *Disapproved.* In the interest of safety, practice ILS approaches are a vital aid in maintaining pilot proficiency. There is also no indication from Long Beach's documentation that practice approaches are noisier than other approaches. FAA also notes that this proposed measure is not consistent with Element F-1, which recommends that flight training/practice should not be prohibited.

(c) *Disapproved.* It would not be possible to restrict the size of the traffic pattern. The size of the pattern is directly related to the different characteristics of the aircraft operating in the pattern. This proposed measure would adversely affect the safe and efficient use of airspace.

12. Implement the following Part 150 Task Force recommendations:

A-2 Implement additional noise monitoring locations as appropriate, including locations at the nearest residential area off the ends of Runway 30/12.

Approved. There are a number of useful purposes for noise monitoring equipment. For reasons of aviation safety, this approval does not extend to the use of such equipment for enforcement purposes by in situ measurement of SENEL.

B-1 Implement aircraft single event noise limits which would prohibit noisier business jets, B-727s, heavily loaded DC-10s, and other aircraft generating similar noise levels.

Disapproved. The FAA disapproves the use of an in situ SENEL measurement for reasons of aviation safety, as previously described in response to Element 4. The FAA also disapproves this proposed measure with respect to the SENEL limits selected by Long Beach based on insufficient information to permit an informed analysis under Section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. There is conflicting information within Long Beach's Part 150 documentation regarding the need to set lower SENEL limits in order to meet their noise/land use goals, and FAA is unable to determine the contribution of the limits to the program (i.e., how many individuals or households would be benefitted). The limits are also suspect as being arbitrary and capricious because of the methodology used — i.e., consideration of noise complaints and consideration of aircraft types, rather than some correlation with noise interference of community/household activity. The FAA is unable to determine from Long Beach's documentation the impact on commerce with respect to airport users which are not air

carriers. The documentation does indicate that approximately 10 percent of the air carrier operations at Long Beach (MD-BO's at high gross weights) would violate the proposed daytime SENEL limits. In view of the analytical inadequacies supporting the noise/land use benefits and reasonableness of the SENEL limits and within the context of Long Beach's overall proposed Part 150 program which, if approved, would include no noncompatible land uses within the 65 CNEL, the FAA finds that the burden on interstate commerce (to the extent it can be determined from the documentation) would be unjustified and undue.

The FAA is not, by virtue of this disapproval, opposing the concept of single-event noise limits at Long Beach so long as those limits are supported by adequate analysis, meet the standards for approval under Part 150, and are administered in a manner so that aircraft are pre-identified as meeting or not meeting the limits (as occurs when using a dBA limit and applying FAA Advisory Circular 36-3D, "Estimated Airplane Noise Levels in A-Weighted Decibels"), instead of relying on individual pilot/aircraft performance in flight.

C-1 All aircraft operators should maximize noise abatement procedures where possible.

Disapproved, pending submission to FAA under Part 150 of sufficient information to permit an informed analysis under section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. FAA cannot determine from Long Beach's documentation which specific noise abatement procedures are included within this recommendation.

C-3 Where possible, aircraft departing Runway 25L should maintain runway heading until reaching an altitude of 1,500 ft. or the L.A. River.

Approved. This procedure is approved subject to the caveats that FAA Air Traffic Control determines when the procedure is appropriate and that the procedure does not apply to aircraft staying in the traffic pattern, which is at an altitude of 1,000 feet.

C-4 Industrial engine runups should be restricted to the hours of 7:00 a.m.-9:00 p.m. (weekdays) and 9:00 a.m.-9:00 p.m. weekends/holidays.

Approved.

C-5 Where possible, multi-engine aircraft should use full length of runways when departing.

Disapproved. Long Beach's Part 150 documentation indicates that the city has included this recommendation with some revision in a proposed local ordinance. The proposed ordinance states that *all* multi-engine aircraft *shall* use the full length of runways when departing ([italics] added). This is an area of responsibility that is Federally preempted and is, therefore, not within the bounds of authority of local government.

FAA is willing to work closely with Long Beach to determine whether the objectives of this measure can be obtained consistent with Federal responsibilities.

D-1 Landing fee structures should provide for differentials based on certificated aircraft noise level of aircraft and time of landing (day, evening, night).

Disapproved, pending submission to FAA under Part 150 of sufficient information to permit an informed analysis under section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. While the concept of noise-based operating fees may be acceptable under Part 150, Long Beach's Part 150 program has not adequately documented that the imposition of such fees and the proposed amounts of the fees (which FAA could not locate in Long

Beach's documentation) bear a reasonable relationship to either the aircraft noise generated or to the goal of reducing noise over noncompatible land uses within the context of Long Beach's other proposal to contain the 65 CNEL so that it would include no noncompatible land uses.

E Military and public aircraft should be included in the calculation of cumulative (CNEL) aircraft noise levels.

Approved, with the caveat that this apprvoal does not extend to the FAA's making a judgment one way or the other with respect to the calculation of the 65 CNEL under California state law, nor does it constitute acceptance of Long Beach's proposed criterion noise level.

F-1 Flight training/practice should not be prohibited.

No Action Required. This is not a measure for FAA determination under Part 150. It is a determination by Long Beach not to pursue this measure.

F-2 Multi-engine aircraft should not depart on Runway 25R.

Disapproved. If particular multi-engine aircraft are able to meet an acceptable SENEL limit under Long Beach's Part 150 program, it would be unjustly discriminatory to preclude them from using a runway for noise reasons. If they cannot meet the limit, they would be excluded anyway, and this measure would be unnecessary for noise purposes. Furthermore, Long Beach's proposal to assign aircraft to runways by local ordinance is disapproved because this is a Federally preempted area of responsibility.

— Pilots should be encouraged, when possible, to maintain training flight tracks outside of residential

areas (within Orange/Cherry, Carson, Clark, and Willow Streets).

Approved, as a voluntary measure only.

— Install visual markets for traffic pattern boundary reference.

Disapproved, pending submission to FAA under Part 150 of sufficient information to permit an informed analysis under section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. This concept is a novel idea which is largely unexplained in the data submitted with the Part 150 program. We do not know, for instance, what kind of visual markers would be installed or whether the marking would be for daytime operations only or for nighttime operations as well. Pilots are taught, of course, to navigate by reference to features on the ground, but usually such features are quite large and easily identified; i.e., a river or an outdoor theater or an expressway. To be capable of relatively easy identification by pilots, such visual markers would have to be quite large, we assume. In any event, more information about the proposal would be necessary before it could be seriously considered by the FAA. It is possible that safety concerns raised by the proposal are not capable of being adequately resolved, however. One of those concerns is the impact of traffic pattern marking on the "see and seen" principle. Pilots who are looking for markers on the ground are less likely to see conflicting traffic. As a result, such a marking system could increase the risk of mid-air collision, a result which is not acceptable.

F-3 Limit general aviation training hours (7:00 a.m.-7:00 p.m. weekdays and 8:00 a.m.-3 p.m. weekends/holidays) and limit runways available for training to 25L/7R, 25R/7L, unless otherwise directed by FAA Air Traffic Control.

Disapproved. FAA recognizes that this proposed ordinance is a continuation of an existing ordinance. However FAA is, for the first time, being requested to approve this measure under Part 150. The airport proprietor is advised that certain provisions of the Ordinance appear to attempt to regulate aircraft operations by dictating airspace use and air traffic management in terms of runway usage based on the purpose of a particular flight. That is a subject area which is not within the authority of an airport operation. In addition, there is a lack of submitted information concerning the contribution of training operations to the noise problem and the benefits of this measure in terms of noise reduction/compatible land use, as well as the potential for unjust discrimination against training operations which are no louder than other operations.

FAA is willing to work closely with Long Beach to determine whether the objectives of this measure can be obtained consistent with these concerns.

G Investigate the feasibility of an off-airport helipad.

Approved. This approval is for a feasibility study and does not constitute approval of a new off-airport helipad. FAA notes that, unless provisions are made for fuel and full service at a remote helipad, the noise between the helipad and the airport would actually increase.

H Conduct a pilot study to eliminate, through sound atttenuation, classroom aircraft noise intrusions in excess of 55 dBA.

Approved.

I-1 Create an on-going committee to monitor results.

Approved.

I-2 Consider relocation of Runway 30 landing threshold to the pavement end, if landing noise is not constraining flight activity.

Disapproved, pending submission to FAA under Part 150 of sufficient information to permit an informed analysis under Section 104(b) of the Aviation Safety and Noise Abatement Act of 1979. The noise compatibility benefits of this proposed measure are not clear; indeed, there is indication in Long Beach's documentation that there may be additional noise impact resulting from the measure. A disapproval under Part 150 is not intended to limit consideration of this measure for other purposes, such as increasing airfield flexibility.

I-3 Study the impact of engine runup noise on the community.

Approved.

13. The City of Long Beach should put itself on a course of self-reliance regarding operation of the Airport, and therefore should no longer accept Federal funds for airport purposes.

No Action Required. This is not a Part 150 program recommendation for FAA determination. It is a determination by Long Beach, which is within the purview of any airport proprietor, no longer to request Federal aid.

APPENDIX H

Memorandum From Dwight E. Bishop — Noise Control Program Run-A

Date: June 5, 1985

AIRPORT NOISE COMPATIBILITY TASK FORCE

MEMORANDUM

June 5, 1985
TO: Task Force Members
FROM: Dwight E. Bishop
SUBJECT: NOISE CONTROL PROGRAM — RUN A

OPERATIONAL CONDITIONS

Airlines

Aircraft mix:
FY 1984 and others. See Tables 1 and 2

Stage length:
See Tables 1 and 2.

Runway Utilization:
BAe 146 aircraft assigned to Runway 25L. Other air carrier aircraft assigned to RW 30 with FY 1984 utilization (90% takeoffs and approaches on RW 30, 10% on RW 12).

Curfew:
Current rules

Number of operations:
A fixed limit on number of operations on RW 30 and RW 25L:
"No more than 2 noise events per hour that interrupt classroom activities between 7 am and 10 pm"

1. Using 65 dB maximum A-level as the classroom criterion,* aircraft likely to produce maximum A-levels of more than 75 dB outdoors at nearest schools were counted as producing a classroom interruption. This criterion generally excludes Citation 1 and 2 and Challenger 600 business jet aircraft, but counts all other jet aircraft as potentially producing classroom interruptions.

2. The "2 events per hour" was interpreted as allowing 30 noise events that could produce classroom interruptions between 7am and 10pm.

General Aviation

Type of Aircraft:

FY 1984 mix for FY 1984 baseline. Replace turbojets with turbofans for all runs. (see Table 1).

Operations:

Same number of total operations as in FY 1984.

Runway Utilization:

All business jet operations on Runway 24L

Curfew:

Current rules

Training Flights:

Same conditions as existing.

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*D.E. Bishop "Noise Criteria for Classrooms", Memo dated 5 June 1985.

Industrial/Charter/Military

Type of Aircraft:

FY 1984 mix for FY 1984 baseline. Replace all B727, DC-8 and B707 charters with MD-80 aircraft for other runs. See Table 1.

Operations:

Same number of operations as in FY 1984.

Runway utilization:

Same as FY 1984.

Curfew:

Same conditions as existing.

LAND USE CONTROLS

Land Use Changes

None

Other Land Use Actions

None

RESULTS

Noise Impacts

FY 1984 operations resulted in an average of 30.3 takeoffs or landing noise events per day on Runway 30/12. This just slightly exceeds the 30 event limit. Hence, the 30 event limit does not impose any significant reduction in jet flights on Runway 30 over FY 1984 operations.

Shifting business jet flights to Runway 25L would permit an increase in air carrier flights on Runway 30 and an increase in passengers carried, with the resulting

CNEL at the nearest residential area exceeding 70 dB (see Table 3).

Elimination of the noisiest jets (Mix A') would result in a similar number of flights and passengers carried, with a reduction of CNEL at the nearest residence to less than 65 dB.

Air carrier Mixes B and C includes BAe 146 aircraft, operating on RW 25L. With limits to 30 noise events on each runway, the total number of air carrier flights would increase to more than 46 per day, with CNEL values at the nearest residence in the range of 63 to 66 dB.

Operations

As noted in Table 3, the number of air carrier flights per day would vary from FY 1984 levels (15.66 per day) upwards to 45 plus per day (the latter assumes use of RW 25L for BAe 146 operations).

Passenger Service

The passenger service levels would vary from FY 1984 totals (approximately 1.16 MAP) upwards to 2.9 MAP dependent upon mix.

Comments

1. Imposing CNEL limits at the nearest residential area of 65 dB would reduce the number of flights for air carrier mixes similar to FY 1984, and Mix A or Mix B. Thus, application of a CNEL limit would generally achieve results similar to the limits on total noise events.

2. Considering that noise events exceeding 75 dB can be produced by air carrier, general aviations, charter, industrial or military jet flights, there does not appear to be any feasible way of restricting such flights throughout the day to a constant rate of 2 per hour or less. Bunching of flights could not be avoided.

APPENDIX I

Memorandum From Dwight E. Bishop — Initial Look at Noise Impact of Jet Aircraft Takeoffs on Runway 25L

Date: March 13, 1985

MEMORANDUM

TO:	Airport Noise Compatibility Advisory Task Force
FROM:	Dwight E. Bishop
SUBJECT:	Initial Look at Noise Impact of Jet Aircraft Takeoffs on Runway 25L (BBN Project 165196)
DATE:	13 March 1985

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1. INTRODUCTION

This memo takes an initial look at the noise impact of jet aircraft takeoffs on Runway 25L. As in previous memos, the analysis is presented in terms of numbers of operations, or numbers of passengers carried, allowed in achieving a 65 db CNEL value at the nearest noise sensitive area (Burroughs School).

2. RUNWAY LENGTH CONSIDERATIONS

Runway 25L/7R is currently 5,420 feet long, but the airport staff has indicated that the runway could be extended to approximately 5,700 feet without major problems. This length is large enough to handle most business jet aircraft and many short and medium haul jet transport aircraft. Runway 25L compares in length with

the active runways at John Wayne and Burbank Airports as follows:

Airport	Runway	Length, Ft.
Long Beach	25L	5420(5700)
John Wayne	19R	5700
Burbank	15	6900
	7	6000

Both the John Wayne and Burbank Airports handle short and medium haul aircraft (with some weight restrictions for some aircraft).

3. NOISE COMPARISONS

As in previous memos, the noise contribution of different aircraft were evaluated at the nearest noise sensitive area (Burroughs School) exposed to noise from takeoffs on Runway 25L. The noise contributions from operations on other runways were neglected in this analysis, hence, the figures presented are somewhat optimistic but provide a good basis for first-cut comparisons.

The takeoff flight paths for departing business jet and air carrier aircraft were assumed to be a takeoff on runway heading until reaching a height of 1,500 feet with aircraft then turning to headings of 180 or 270 degrees.*

Table 1 summarizes the basic information utilized to estimate the maximum number of takeoffs and passengers per year for each aircraft considered in the analysis, assuming only that type of single aircraft operated on Runway 25L. The assumptions as to the day/evening/night factor and load factors are listed in the table. Figures 1 and 2 compare the numbers of departures, while Figure 3 shows the number of passengers per year

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*Mr. Jerry Yocum, FAA Fower [sic] Chief, has indicated that the turns could be instituted at heights from 800 to 1,500 feet. Further study may indicate desirability of turning at a height of less than 1,500 feet.

for the air carrier aircraft. Figure 1 truly illustrates the large difference in noise between the general aviation propeller aircraft and the noisy business jet aircraft. Note that the noise from the small Citation 1 and 2 business jet is comparable with that from typical 2-engine propeller aircraft.

Runway 25L is currently used heavily by general aviation propeller aircraft, with the runway handling approximately 42% of all daily departures of general aviation propeller aircraft. Table 2 and Figure 4 show the noise contributions by non-carrier aircraft (based on totals of operations for FY 1984). The noise contibutions from the general aviation propeller aircraft amount to approximately 15 equivalent flights (out of a total of 100 to reach a 65 dB CNEL).

If 50% of the FY 1984 business jets were diverted to Runway 25L, the number of equivalent flights would approximate 116, increasing the CNEL to over 65 dB.

If the "noisy" turbojets were replaced with quieter turbofan business jets, the number of equivalent flights (current propeller flights plus 50% of business jets) would approximate 33 (producing a CNEL of about 60 dB). Assuming a total CNEL of 65dB, approximately 65 equivalent flights would be available for air carrier takeoffs.

Table 3 lists the numbers of takeoffs per day and passengers carried for various air carrier aircraft and fleet mixes that could be accomodated for a limit of 65 equivalent flights. The numbers of takeoffs per day could

range from approximately 13 per day (MD-80 short range) to an excess of 74 for the BAe 146.

4. CONCLUSION

This analysis indicates that there could be substantial numbers of business jet and/or carrier operations on Runway 25L before the CNEL 65 dB contour extended into the nearest noise sensitive areas (schools and residences). However, it should be noted that a sizable number of jet takeoffs on Runway 25L would result in a considerable increase in noise levels in areas not currently exposed to noise from operations on 25L. New neighborhoods would be exposed to noise from jet aircraft.

The next analysis steps should include:

(a) A more detailed review of air traffic procedures for handling jet aircraft on Runway 25L.

(b) A more thorough study of flight tracks to minimize noise and air traffic impacts.

(c) A noise contour study that would reflect the noise contribution of operations on Runway 25L plus other runways and the added noise impact on the approach path to Runway 30 for the additional jet takeoffs on Runway 25L.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 10, 1987, I served the within Joint Brief of Respondents in Response to Petition for Certiorari in re: "City of Long Beach vs. AirCal, Inc." in the United States Supreme Court, October Term 1986, No. 86-2002;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 10, 1987, at Los Angeles, California

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